Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

GENE FLACK,

Petitioner,

v.

CALIFORNIA,

Respondent.

**Petition For Writ Of Certiorari
To The Court Of Appeal
Of The State Of California,
Second Appellate District, Division Four**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the joint trial of petitioner with his two co-defendants before two juries, one for petitioner and Brown and the other for Godlewski, violate his Sixth and Fourteenth Amendment rights because

(a) Codefendant Brown's unredacted statement incriminating petitioner by name was admitted over objection under *Bruton v. United States*, 391 U.S. 123 (1968) on the basis that the trial judge's limiting instruction satisfied *Richardson v. Marsh*, 481 U.S. 200 (1987)?

(b) Codefendant Godlewski was allowed to present his antagonistic and irreconcilable defense before petitioner's jury without regard for the risk of prejudice recognized in *Zafiro v. United States*, 506 U.S. ___ (1993)?

2. Did the California courts improperly conclude that even though codefendant Godlewski's defense was admitted before petitioner's separate jury, Godlewski's inculpatory statements to his lawyer overheard by a third party were inadmissible under the attorney-client privilege despite petitioner's claim under the Sixth and Fourteenth Amendments that he was denied confrontation and the right to present exonerating evidence to his jury?

3. Do the restrictions upon voir dire examination in criminal but not civil cases imposed by California Proposition 115, providing that the court shall question prospective jurors and precluding examination except in aid of the exercise of challenges for cause, violate the Fourteenth Amendment's Equal Protection Clause because all California litigants in civil cases are entitled to examine

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prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause?

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PETITION FOR WRIT OF CERTIORARI

Gene Marshall Flack, Jr., respectfully prays that a writ of certiorari issue to review three important constitutional questions presented by the judgment of the California Court of Appeal, following his joint trial with two codefendants and sentence to life imprisonment without possibility of parole.

OPINION BELOW

The opinion of the Court of Appeal for the State of California, Second Appellate District, Division Four, was deemed certified for partial publication and is reported at *People v. Godlewski, et al.*, 17 Cal.App.4th 940 (1993); it is

reproduced as an Appendix to this petition, A1-A68. The order of the California Supreme Court denying the petitions for review of the Court of Appeal's decision by all defendants is unreported; it also is appended. A69.

JURISDICTION

The judgment of the California Court of Appeal is set forth in its opinion filed August 5, 1993. The California Supreme Court denied the petition for review on October 21, 1993. Under California law, the judgment of the Court of Appeal became final upon the Supreme Court's denial of review. Cal. Rules of Court, R. 24, 25, 28. This petition is timely filed after obtaining an order from Justice O'Connor granting petitioner an extension of time for 21 days, to and including February 9, 1994, within which to file the petition after the 90-day period of finality. Application No. A-554. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution, whose Confrontation and Compulsory Process Clauses provide:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor."

The Fourteenth Amendment to the United States Constitution, whose Due Process and Equal Protection Clauses provide:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

California Code of Civil Procedure § 222.5 provides:

"To select a fair and impartial jury in civil jury trials, the judge shall examine the prospective jurors. Upon completion of the judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause. During any examination conducted by counsel for the parties, the trial judge shall permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. The fact that a topic has been included in the judge's examination should not preclude additional nonrepetitive or nonduplicative questioning in the same area by counsel.

"The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the trial judge's sound discretion. In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the judge should consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. Specific unreasonable or arbitrary time limits shall not be imposed.

"The trial judge should permit counsel to conduct voir dire examination without requiring

prior submission of the questions unless a particular counsel engages in improper questioning. For purposes of this section, an 'improper question' is any question which, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law. A court should not arbitrarily or unreasonably refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel. . . . "

California Code of Civil Procedure § 223 provides:

"In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.

"Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.

"The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution."

STATEMENT OF THE CASE

The California Court of Appeal's opinion summarizes succinctly the pertinent facts and background supporting the judgment. Petitioner reproduces that statement here as follows:

"Raymond Godlewski, desiring to kill his father, hired Gene Flack to commit the crime. Flack enlisted Michael Brown's assistance. At approximately 12:30 a.m. on July 4, 1989, Brown drove Flack to the victim's home in Sylmar. Flack knocked on the door. When the victim answered, Flack murdered him with a single shotgun blast to the head. Brown drove Flack from the scene.

"On July 5, 1989, Flack told Paul Caines that he had committed the murder. Caines notified the police. The police interviewed Flack and Brown but released them. Several days later, the police arrested Godlewski and Brown. Flack fled to Louisiana but was soon apprehended.

"The three men were jointly charged and tried. However, one jury was impanelled for Brown and Flack while another jury was impaneled [sic] for Godlewski. At certain points, each jury was excluded during portions of the People's case although both juries heard all of the defense evidence.

"Godlewski testified and admitted hiring Flack to kill his father. He asserted that he had done so because of a lifetime of physical and emotional abuse suffered at his father's hands. Additionally, he claimed he was fearful of his father because of threats he had made shortly before his death. The jury apparently credited Godlewski's claim to a certain extent because, although charged with first degree murder with the special circumstances allegation

of murder for financial gain, he was convicted only of second degree murder.

"Flack testified and denied having committed the murder. He admitted only that he had purchased a shotgun for Godlewski. Flack claimed that it was Godlewski who actually shot the victim. The jury disbelieved Flack and found him guilty of first degree murder and found true the special circumstances allegation of murder for financial gain.

"Brown did not testify and presented no defense. Essentially, he argued that the People's circumstantial evidence case against him did not establish guilt beyond a reasonable doubt. The jury disagreed and found him guilty of first degree murder. (The special circumstance allegation against Brown had been stricken before trial at the request of the People.)" A2-A3.

Based on his conviction of special-circumstances murder, petitioner was sentenced to life imprisonment without parole. Codefendants Godlewski and Brown received indeterminate terms with a maximum of life, but subject to parole eligibility.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I THE DETERMINATION OF THE CALIFORNIA COURT OF APPEAL TO SANCTION THE JOINT TRIAL OF THE THREE DEFENDANTS BY TWO JURIES CONSTITUTED ERROR UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WHEN CODEFENDANT BROWN'S UNREDACTED STATEMENT INCRIMINATING PETITIONER BY NAME WAS ADMITTED BUT PETITIONER'S REQUEST FOR SEVERANCE OF GODLEWSKI'S MUTUALLY ANTAGONISTIC DEFENSE FROM HIS OWN WAS DENIED

A. INTRODUCTION

Although characterized by the California Court of Appeal as a "murder-for-hire case", A2, *that* was the critical issue that the trial court – denying requests by all three codefendants for separate trials – ruled would be tried jointly by *two* juries. Godlewski, afforded his own separate jury, was convicted of only second degree murder. Petitioner, who denied being the triggerman hired by Godlewski, was tried with Brown by a second jury which convicted both of murder in the first degree. Petitioner maintained that this dual-jury procedure prejudiced him in two different but significant respects.

One consequence was the court's admission of Brown's extrajudicial statement that incriminated petitioner by name in the murder; although the court gave the jury a proper limiting instruction, it refused to redact Brown's statement to eliminate petitioner's name. Another was to allow petitioner's jury to hear the entirety of Godlewski's lengthy defense, a hodgepodge of diminished capacity, imperfect self-defense, and battered-son

syndrome aimed at enlisting the mercies of the Godlewski jury; although it cast petitioner as the chief villain, Godlewski's mitigating evidence was largely irrelevant to the issue of who fired the fatal shots. Godlewski's defense thus reinforced the inherent problems of prejudice created by joint trials, while his counsel acted as petitioner's second "prosecutor."

Two interrelated constitutional problems resulted from the trial court's refusal to sever petitioner's trial from his two codefendants. The first presents the narrow question of whether *Richardson v. Marsh*, 481 U.S. 200 (1987), which declined to find Confrontation Clause error under *Bruton v. United States*, 391 U.S. 123 (1968) "when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial," *Richardson*, at 202, is applicable when the nontestifying codefendant names the defendant in his statement. In other words, are redaction and a limiting instruction conjunctive, or merely disjunctive, requirements to avoid *Bruton* error?

The second and broader question arises in the wake of this Court's recent reiteration of *Richardson's* preference for joint trials of jointly-charged defendants unless mutually antagonistic or irreconcilable defenses create a serious risk of prejudice. *Zafiro v. United States*, 506 U.S. ___, 122 L.Ed.2d 317 (1993). California follows a hard-and-fast rule of joinder and appears to reject the possibility that prejudice may require severance. This case raises whether that inflexible approach denied petitioner due process of law.

B. WHETHER THE CALIFORNIA COURTS' CONCLUSION THAT *BRUTON V. UNITED STATES* IS NOT VIOLATED BY THE ADMISSION OF A CODEFENDANT'S UNREDACTED INCRIMINATING STATEMENT NAMING THE DEFENDANT WHEN THE TRIAL JUDGE GIVES A LIMITING INSTRUCTION HAS RESULTED IN AN IMPERMISSIBLE EXTENSION OF *RICHARDSON V. MARSH*

The trial court rejected petitioner's reliance upon *Bruton v. United States*, 391 U.S. 123 (1968), as requiring that either he be granted a separate jury from codefendant Brown, or that Brown's statement to Mikki Bei informing her of his plan to commit a crime with petitioner on the night of the murder be redacted to remove the reference explicitly naming petitioner. As the California Court of Appeal explained:

> "Mikki Bei, a prosecution witness, testified that she telephoned Brown at approximately 5 p.m. on July 3, 1989, and asked about his plans for that evening. Brown told her that he and Flack were 'going to do something but he couldn't tell [her]' anything else except he did disclose $3,000 was involved. Although the court overruled Flack's objection to Bei's testimony, it did instruct the jury at that point that 'this statement is limited solely to defendant Brown and is not to be used by you as against any of the other two defendants.' " A15-A16 (footnotes omitted).

Although the Court of Appeal relied in part upon the facial ambiguity of Brown's reference to his scheme with petitioner, suggesting it "only became potentially incriminating when viewed in conjunction with other testimony," A17, plainly the evidence before petitioner's jury required no further "contextual implication," *Richardson*

v. Marsh, 481 U.S. 200, 208-209 (1987) – as it bore upon the inquiry "whether the jury can possibly be expected to forget [the codefendant's statement] in assessing the defendant's guilt," *id.* at 208 – to require the giving of a limiting instruction to avoid the *Bruton* problem. Indeed, the trial judge herein recognized that Brown's statement could not be admitted *without* a limiting instruction and emphasized that point when Brown's statement was admitted. See A17, n. 11. *Richardson*, however, held that *redaction* of the codefendant's statement *also* was required to comply with *Bruton*. 481 U.S. 208-211. The Court of Appeal's contrary conclusion in the present case takes *Richardson v. Marsh* too far.

That a proper limiting instruction does not suffice without redaction of the codefendant's statement appears implicit in *Cruz v. New York*, 481 U.S. 186 (1987), the companion decision to *Richardson*, which acknowledged that "in the real world of criminal litigation, . . . a codefendant's confession that corroborates the defendant's confession significantly harms the defendant's case whereas one that is positively incompatible gives credence to the defendant's assertion that his own alleged confession was nonexistent or false." *Id.* at 192. If it is "illogical, and therefore contrary to common sense and good judgment, to believe that codefendant confessions are less likely to be taken into account by the jury the more they are corroborated by the defendant's own admissions," *Cruz* at 193, in a case like petitioner's where the "positively inverse relationship" between the "interlocking" nature of the statements and the "devastating" character of the codefendant's own statement increases the likelihood that the jury *will* fail to obey a limiting instruction, *id.* at 192-193, the unredacted statement

should remain inadmissible under *Bruton*. Despite the emphasis in portions of *Richardson v. Marsh* upon the pragmatic value of limiting instructions, 481 U.S. at 208, 211, the heart of that holding is in the narrow but critical distinction between naming the defendant and incriminating him only through linkage with other evidence. In *Richardson's* terms, the "calculus changes," *id.* at 211, in this case not by reason of any limiting instruction, but because the statement of Brown naming petitioner was "incriminating on its face," *id.* at 208.

The contrary reading of *Richardson* by the two courts below reflects confusion on this critical point, and the decision's reliance upon the "only . . . potentially incriminating," A17, nature of Brown's unredacted statement injects an unnatural requirement of recourse to *other* evidence before *Bruton* is deemed applicable.[1] If a limiting instruction is enough, and the further requirement of redaction merely is surplusage, that direction should come squarely from this Court. Until then certiorari is necessary to provide that guidance.

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[1] In the course of its *Bruton* discussion, the Court of Appeal abruptly shifts gears to state that any assumed error was harmless – noting the testimony of four people that petitioner admitted committing the murder. A17. Although couched in terms of harmless-error analysis, the court seemingly places the prejudice "cart" before the error "horse". With the adoption in *Cruz* of Justice Blackmun's view in *Parker v. Randolph*, 442 U.S. 62 (1979), it is erroneous to believe that a defendant's own confession will deprive the codefendant's statement of its "devastating" character for *Bruton* purposes. Interestingly, elsewhere the opinion sets forth the "overwhelming" evidence "in more detail" in addressing whether there was *error* in jointly trying the three defendants. Thus it cannot be concluded that the court would have found the constitutional error to be harmless had it correctly decided the Confrontation Clause issue.

C. WHETHER THE UNIVERSAL CALIFORNIA PRACTICE OF JOINT TRIALS BY DUAL JURIES WHEN CODEFENDANTS PRESENT ANTAGONISTIC AND IRRECONCILABLE DEFENSES WITHOUT CONSIDERATION OF THE RISK OF PREJUDICE IS INCONSISTENT WITH THE PRINCIPLES ESTABLISHED IN *ZAFIRO V. UNITED STATES*

Petitioner also objected to being tried jointly with Godlewski, but with separate juries, arguing that "this procedure resulted in prejudicial error because he and Godlewski each accused the other of committing the murder" and "permitting the jury to hear the antagonistic and inconsistent defenses deprived him of due process of law." A19 (footnote omitted). Rejection of this claim was a foregone conclusion, however, because California courts universally deny severance in the face of asserted inconsistent defenses between codefendants, e.g., *People v. Hardy*, 2 Cal.4th 86, 168 (1992); *People v. Wallace*, 9 Cal.App.4th 1515, 1519 (1992), and approve the use of dual juries to avoid the introduction of evidence inadmissible against all defendants, e.g., *People v. Cummings*, 4 Cal.4th 1233, 1286-1289 (1993). These cases fail to accord sufficient weight to this Court's recognition that even with the preference for joint trials in the federal system, separate trials still may be necessary "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. ___, 122 L.Ed.2d 317, 325 (1993).

The *Zafiro* case, petitioner readily acknowledges, limited its holding to whether Rule 14 of the Federal Rules of Criminal Procedure required separate trials "as a matter

of law when codefendants present 'mutually antagonistic defenses.' " 506 U.S. at ___, 122 L.Ed.2d at 323. Nevertheless, the Due Process Clause is an implicit if not explicit premise on which three recent cases cited in *Zafiro*, as examples of the "relatively few" reversals that had resulted "for failure to grant a severance on grounds of mutually antagonistic or irreconcilable defenses," were based. 122 L.Ed.2d at 325 (citing *United States v. Tootick*, 952 F.2d 1078 (CA 9 1991); *United States v. Rucker*, 915 F.2d 1511 (CA 11 1990); *United States v. Romanello*, 726 F.2d 173 (CA 5 1984)). But as exemplified by *Wallace*, *supra*, a pre-*Zafiro* decision, California categorically rejects that line of federal authority as inapposite to its state's trials. 9 Cal.App.4th at 1519, n. 3. Thus while *Zafiro* leaves open at least a crack in the door when the defendant proves a cognizable risk of prejudice, the California courts have effectively bolted the door shut.

In the present case, the California Court of Appeal follows *Wallace* in lock step. A21, A24. But it also touches, perhaps unwittingly, upon a critical problem. Unlike cases in which two or more codefendants are tried by a single jury, *two* juries were said to provide these benefits: "Negat[ing] the possibility that *one* jury would be presented with the dilemma that acceptance of one defendant's defense would preclude acquittal of the other(s);" "the prosecutor did not argue Godlewski's guilt to the Flack/Brown jury nor did counsel for Godlewski argue to the Flack/Brown jury;" and petitioner's jury did not have to decide Godlewski's guilt. A23. That, however, is precisely where the greatest risk of prejudice lies. As has often been observed, joinder may offer "perverse incentives" that influence "the truth and content of the testimony." *Tootick*, 952 F.2d at 1082; see *Com. v. Moran*, 442

N.E.2d 399, 408 (Mass. 1982). Not only did petitioner's jury hear days of testimony about Godlewski's domination and abuse at the hands of his father, but the very nature of Godlewski's elaborate sympathy-generating defense presented him with a powerful incentive to perjure himself about past events that were irrelevant to petitioner's circumstances and largely impossible to disprove. Moreover, Godlewski's attorney necessarily assumed the role of petitioner's second prosecutor to emphasize the black-and-white contrast in their respective conduct.

Hence, the very factors upon which the Court of Appeal relied – and that the cases upholding dual juries in California reiterate, see *Cummings*, 4 Cal.4th at 1287-1288 – directly raise the specter of prejudice noted in *Zafiro*. 122 L.Ed.2d at 325 ("Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant"). Here, moreover, "the interests of justice by avoiding the scandal and inequity of inconsistent verdicts," *Richardson v. Marsh*, 481 U.S. at 210, were not served; to the contrary, the two juries in this case did *not* reach consistent verdicts and the procedure used by the trial court clearly contributed to inaccurate assessment of relative culpability, even assuming the soundness of the prosecution's theory (as did the Court of Appeal) that Godlewski hired petitioner to murder his father.

Accordingly, in their haste to ratify the use of dual juries to cure prejudice to the state, the California courts have opened a Pandora's box of prejudice to the accused that *Zafiro* tacitly contemplated but did not squarely address. If *Zafiro's* principles are applicable to state court

prosecutions – as they should be under the Due Process Clause – they are clearly irreconcilable with the Court of Appeal's rigid adherence to the denial of separate trials in rejecting petitioner's submission that he did not receive a fair trial. On this issue as well, this Court's clarification and guidance is needed.

II THE CALIFORNIA COURT OF APPEAL'S DETERMINATION THAT CODEFENDANT GODLEWSKI'S INCULPATORY STATEMENTS TO HIS LAWYER OVERHEARD BY A THIRD PARTY WERE INADMISSIBLE UNDER THE ATTORNEY-CLIENT PRIVILEGE INCORRECTLY DENIGRATES PETITIONER'S CONFRONTATION AND DUE PROCESS RIGHTS AND IMPROPERLY SKEWS THE BALANCING APPROACH REQUIRED TO RESOLVE A DEFENDANT'S CLAIM THAT HIS CONSTITUTIONAL INTEREST IN PRESENTING EXONERATING EVIDENCE OVERRIDES A CODEFENDANT'S INVOCATION OF STATUTORY PRIVILEGE AT THEIR JOINT TRIAL

Petitioner's defense to the prosecution's theory that he shot and killed codefendant Godlewski's father was to shift the blame onto Godlewski himself, just as Godlewski in his testimony denied responsibility for the actual killing and claimed petitioner was the shooter. Although petitioner was able to impeach some aspects of Godlewski's testimony, the trial court rejected petitioner's request to call as a witness Steve White, a county jail inmate, to testify that he overheard a conversation between Godlewski and his lawyer in the "lockup" next to the courtroom on the day the defendants were arraigned, in which Godlewski responded to his counsel's suggestion, " 'You would have been better off saying

that you did it instead of blaming these guys,' " by replying, " 'You are right. That's what I'm going to tell them, that *I did it, not these guys.*' " A33 (internal quotations omitted). The trial judge, however, sustained Godlewski's assertion of the attorney-client privilege, and determined that it had not been waived because the conversation occurred in White's presence. *Ibid.* When petitioner later renewed his motion, the court reiterated the previous ruling and denied petitioner's alternative proposal that White be permitted to testify only in front of the Flack-Brown jury. A34.

On appeal, petitioner argued that the trial court (1) incorrectly concluded that California's statutory attorney-client privilege is an integral part of the federal *constitutional* right to counsel, (2) erred in rejecting appellant's contention that his constitutional rights to confrontation and due process of law *outweighed* Godlewski's interest in confidentiality of the attorney-client communication overheard by White, and (3) failed to recognize that Godlewski's interests were adequately protected by *limiting* disclosure of his statements to petitioner's jury. In the portion of its opinion certified for publication, 17 Cal.App.4th 940, the California Court of Appeal rejected petitioner's submission in its entirety. A32-A44.

The appellate court's determination that Godlewski's statements to his lawyer were properly excluded addressed the issue much differently than the trial court. Essentially the decision analyzed the problem from two perspectives. First, reviewing California law – and implicitly rejecting the judge's reliance on the Sixth Amendment as a basis to uphold the exclusion of confidential attorney-client communications – the Court of Appeal found it "not surprising that the California courts

have not yet embraced Flack's position." A36. "Thus, it is patent that the attorney-client privilege is not one to be easily discarded merely because a defendant asserts that invocation of the privilege results in the denial of his right to a fair trial." A38. Second, examining a line of decisions from other jurisdictions cited by petitioner, see *Neku v. United States*, 620 A.2d 259 (D.C. App. 1993); *United States ex rel. Blackwell v. Franzen*, 688 F.2d 496 (CA 7 1982), which the appellate court here observed had "adopted a balancing approach to decide whether or not the attorney-client privilege should yield to the accused's right to confront and cross-examine," A38, the court restricted those cases to their facts, observed that "neither holds that the defendant has a per se right to breach the attorney-client privilege in order to present a defense," A41, and emphasized petitioner's failure to cite "any case in which a court has concluded that the balance weighed in favor of overriding the attorney-client privilege and disclosing the information at trial." A42-A43.

This resolution of the issue denigrates constitutional authority and is fundamentally at odds with the proper balancing approach that must be undertaken when the invocation of a statutory privilege interferes with the right "of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). In rejecting petitioner's proffer of Godlewski's inculpatory statements, the state courts have exalted Godlewski's fortuitous resort to a statutory rule of exclusion – made available because the statements overheard by inmate White were made also in the presence of Godlewski's lawyer – and subverted " 'the conviction of our time that a truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who

may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court. . . . ' " *Washington v. Texas*, 388 U.S. 14, 22 (1967) (quoting *Rosen v. United States*, 245 U.S. 467, 471 (1918)).

The proper reach of the attorney-client privilege when applied, as here, to bar a criminal defendant's production of relevant evidence and from confronting his accuser, undoubtedly presents one of the most basic dilemmas of the criminal justice system. It has long been recognized that "since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976). As one distinguished scholar has emphasized,

> " . . . no argument of justification should ignore the fact that the attorney-client privilege, as far as it goes, is not only a principle of privacy, but also a device for cover-ups. That, of course, is what makes contemplation of it both interesting and troubling."

Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal.L.Rev. 1061, 1062 (1978); accord McCormick on Evidence, § 78, at 165 (1972). As the Court has said in a related context, statutory privileges represent "exceptions to the demand for every man's evidence [that] are not lightly created or expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974) (fn. omitted).

Most California authority has given short shrift to these concerns even where the defendant establishes that the privilege must be breached if he is to enjoy full

exercise of his rights of confrontation, compulsory process, and a fair trial.[2] But if the California courts remain curiously untroubled about the "legally dubious or dirty business" that concerned Professor Hazard, 66 Cal.L.Rev. at 1062, the immutability accorded the privilege despite the accused's competing interests conflicts squarely with this Court's recognition that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination," *Davis v. Alaska*, 415 U.S. 308, 316 (1974); under

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[2] The three cases cited by the Court of Appeal's decision are typical: *People v. Johnson*, 47 Cal.3d 1194, 1228 (1989); *Littlefield v. Superior Court*, 136 Cal.App.3d 477 (1982); *People v. Flores*, 71 Cal.App.3d 559 (1977). Although each case arguably is distinguishable because the value of the privileged material to the defense and showing in support of breaching the privilege was highly speculative, all illustrate the broadest imaginable deference to the privilege contrasted with the most grudging reception of the constitutional interests advanced by defendants. As petitioner argued below, those cases appear inconsistent with another line of decisional authority respecting other statutory privileges. See cases cited at A41-A42, n. 27.

In a very recent decision upholding a murder conviction and judgment of death, the California Supreme Court (over a vigorous dissent by Justice Kennard) rejected the defendant's contention that the exclusion of the testimony of his witness that another person committed the crime resulted in a violation of the constitutional right to present a defense. *People v. Cudjo*, 6 Cal.4th 585, 604-612 (1993); and see *id.* at 637-641 (dis. opn.). It thus appears that the majority (5-2) of California's high court continues to adhere to the view that the defendant's constitutional interests in presenting a defense are entitled to less weight than statutory rules of evidence. While the result in the present case was to affirm a sentence of life imprisonment without parole, as opposed to the life-or-death consequences in *Cudjo*, the same principle was applied.

Davis, Godlewski's insistence on testifying without revelation of his damaging statements to his lawyer, "free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself." *Id.* at 320.

This Court's cases have repeatedly cautioned against the application of a State's evidentiary rule to defeat a defendant's constitutional rights. *Rock v. Arkansas*, 483 U.S. 44, 53-56 (1987) (right to testify); *Chambers v. Mississippi*, *supra*, 410 U.S. at 302 (right to present witnesses in his own defense); *Washington v. Texas*, *supra*, 388 U.S. at 22-23 (same). While the decisions also recognize that such rights " 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process,' " *Rock*, at 55 (quoting *Chambers*, at 295), the State's policy interests reflected in preclusive rules of evidence "cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Davis*, 415 U.S. at 320. Even the weighty interests inherent in the presidential privilege of confidentiality, this Court concluded in *United States v. Nixon*, must give way when its withholding in a criminal trial "would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." 418 U.S. at 712.

It is only at the very close of the opinion's analysis of this question, in a footnote at the end of the penultimate paragraph, A41-A42, n. 27, that the Court of Appeal even acknowledges that "a balancing process" is properly employed "to decide if a breach of the privilege is necessary to implement the accused's constitutional rights." A41. If that passage and the attendant footnote appear to

pay lip service to petitioner's interests in cross-examining Godlewski and presenting inmate White's testimony about Godlewski's admissions, however, the remainder of the court's determination of that issue treats the attorney-client privilege invoked by Godlewski's lawyer as a species of holy writ. Its conclusion that "only the most extraordinary circumstance would justify disclosure of privileged communications between lawyer and client," A35, effectively disregards the lessons of *Washington*, *Davis*, *Chambers*, and their progeny, and converts the co-defendant's right to assert the privilege before *his* jury into a license to lie against petitioner without fear of being impeached by his damning statements.

This is not the appropriate time or place to take issue with the California Court of Appeal's factual evaluation of this case vis-a-vis *United States ex rel. Blackwell v. Franzen*, *supra*, 688 F.2d 496 and *Neku v. United States*, *supra*, 620 A.2d 259; for present purposes the important point is the degree to which the court overstates the dangers in allowing the privilege to be "easily discarded" when the right to a fair trial is advanced. A38. Not only is it a poor rationalization to rely on "a great potential for mischief inherent in a case such as this where codefendants are jointly tried but each attempts to shift responsibility to the other," A40, when petitioner urged unsuccessfully in the trial court that his trial should be *severed* from Godlewski's for that reason among others, and short of that argued that the Godlewski jury need not hear the admissions, but it is disingenuous to honor Godlewski's claim of privilege in the name of shield and then allow him to use it as the proverbial sword when he testified in his own defense *before petitioner's jury* – all the while immune from cross-examination or rebuttal as to

"privileged" statements.[3] The failure of any court below to recognize the availability of a broad array of protective remedies – e.g., affording Godlewski use immunity, or admitting the Godlewski statements before petitioner's jury outside the presence of the separate jury determining Godlewski's guilt – is a sure sign that any so-called balancing approach was illusory.

In sum, the California decisions exemplified by the one *sub judice* treat the attorney-client privilege as largely inviolable even where, as here, the result is to preclude the defendant from presenting critical defense evidence and to allow his codefendant an unwarranted aura of veracity free from confrontation. This Court should address whether the defendant's constitutional interests ever prevail in these circumstances, and whether the Court of Appeal gave undue weight to the statutory privilege.

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[3] Purporting to apply factors examined in *Neku*, 620 A.2d at 263, the court finds the balance weighed against petitioner because Godlewski's admissions were somewhat equivocal and, in any event, petitioner, his mother and his grandmother all testified that Godlewski separately confessed to them. Such self-serving evidence hardly provided an adequate surrogate for independent testimony about Godlewski's tell-tale admissions to his lawyer. As for the weight due Godlewski's admissions, surely that was for the jury to measure.

Moreover, the record is replete with instances in which the State prosecutor took advantage of the judge's ruling to insulate the prosecution case from attack by petitioner's counsel on Godlewski's credibility by arguing that Godlewski's credibility problems were "*not* with *what* happened but why it happened." Tr. 3620 (emphasis added); see also *id.*, at 3445-3449, 3478-3479.

III THE CALIFORNIA COURT OF APPEAL'S REJECTION OF THE EQUAL PROTECTION CHALLENGES TO CALIFORNIA PROPOSITION 115'S RESTRICTIONS IN CRIMINAL BUT NOT CIVIL CASES UPON COUNSEL QUESTIONING PROSPECTIVE JURORS AND VOIR DIRE EXAMINATION IN AID OF THE EXERCISE OF PEREMPTORY CHALLENGES IS INCOMPATIBLE WITH THIS COURT'S FRAMEWORK FOR EQUAL PROTECTION ANALYSIS PARTICULARLY BECAUSE HEIGHTENED SCRUTINY IS IMPLICATED

Under Proposition 115, denominated the "Crime Victims Justice Reform Act," an initiative measure adopted by California voters and effective June 6, 1990, voir dire examination of prospective jurors in criminal cases was altered in two significant aspects. The previous rule in California established by the California Supreme Court had declared that "counsel should be allowed to ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges whether or not such questions are also likely to uncover grounds sufficient to sustain a challenge for cause." *People v. Williams*, 29 Cal.3d 392, 407 (1981). Section 7 of Proposition 115, codified as Cal. Code Civ. Proc. § 223, instead provides that the court rather than the attorneys "shall conduct the examination of prospective jurors" and that the examination "shall be conducted only in aid of the exercise of challenges for cause." See *Tapia v. Superior Court*, 53 Cal.3d 282, 286-287 (1991). The statutory provision governing jury selection by civil litigants, however, "gives counsel for each party the right to examine prospective jurors 'to enable [them] to intelligently exercise both peremptory challenges and challenges for cause.' " *People*

v. Boulerice, 5 Cal.App.4th 463, 469-470 (1992), quoting Cal. Code Civ. Proc. § 222.5 (fn. omitted).

Trial in the present case commenced July 16, 1990, and the trial court applied the provisions of Proposition 115 including the newly-enacted restrictions upon voir dire examination.[4] During the course of jury selection, the trial judge denied defense counsels' requests to personally question prospective jurors, and overruled the defendants' subsequent motion for a mistrial based on the court's refusal to allow any questioning that would facilitate peremptory challenge of individual jurors. See Tr. 74-78, 160-164. As acknowledged by the California Court of Appeal, petitioner thus timely contended that "these provisions result in a denial of equal protection because the restrictions apply to criminal cases but not to civil cases." A4 (fn. omitted).

The Court of Appeal summarily approved the distinctions established by Proposition 115, cf. Cal. Code Civ. Proc. § 223 with *id.*, § 222.5, citing three other California appellate court decisions that had recently rejected similar equal protection claims. *Boulerice, supra*, 5 Cal.App.4th at 477-480; *People v. Leung*, 5 Cal.App.4th 482, 494-497 (1992); and *People v. Banner*, 3 Cal.App.4th 1315, 1322-1324 (1992). The California Supreme Court denied review in each. A4. In a single sentence, the appellate court's decision in petitioner's case explained its rationale: "Suffice it to note that we adhere to the view that

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[4] The California Supreme Court subsequently held that the provisions of Proposition 115 pertaining to "the conduct of trials rather than the definition of, punishment for, or defenses to crimes . . . may be applied to pending cases regardless of when the charged offense is alleged to have occurred." *Tapia*, 53 Cal.3d at 299-300.

the electorate did not make an irrational distinction in seeking to curtail the excesses of voir dire in criminal cases and the attendant harm of protracted trials and backlogged court systems." *Ibid.*

As no subsequent published California decision has addressed the same contention – petitioner's counsel is aware of other *un*published appellate court decisions rejecting similar arguments and citing the same cases – California law on this question has become firmly fixed by the principles established and conclusions drawn in the *Banner, Boulerice* and *Leung* cases. Nevertheless, the two appellate districts responsible for that trilogy did not come to the same conclusion without debate; indeed, the reasons for upholding the statutory classification scheme differed in each of the three, even though two – *Boulerice* and *Leung* – were decided by different panels of the very *same* court, with the two justices who participated in both able to agree only on the result.

The approaches in all these cases, petitioner respectfully suggests, are not only confusing and inconsistent, but represent flawed constitutional analysis. To begin with, their assumption that no constitutional question is presented because the right to peremptory challenges is of statutory origin only begs the equal protection question. Cf. *Banner, supra,* 3 Cal.App.4th at 1324. This court has recognized in the past that when provision is made "by statute or rule" to allow examination of potential jurors in aid of peremptory disqualification, as *is* still permitted in California, "lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges. . . . " *Rosales-Lopez v. United States,* 451 U.S. 182, 188 (1981); see also *United States v. McAnderson,* 914 F.2d 934, 942 (CA 7 1990) ("[a]n adequate *voir dire*

must . . . provide the defendant the information necessary to exercise his right to peremptory challenges").

Moreover, as repeatedly urged below, the trial judge's inadequate examination also impaired their ability to develop challenges *for cause* based on bias or other grounds. Thus, the statement in *Boulerice*, 5 Cal.App.4th at 474, that "the enactment challenged here does not touch on a fundamental right or involve a suspect classification," hence is subject only to the rational relationship test, cf. *Leung*, 5 Cal.App.4th at 482, is far less certain than those courts have assumed. Because, as one California case has implied, a heightened standard may be applicable when similarly situated litigants in criminal and civil cases are treated unequally, see *Lucas v. Superior Court*, 203 Cal.App.3d 733, 738-739 (1988); cf., e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988), it does not necessarily follow that no fundamental right of the accused is implicated simply because " '[t]he matter of peremptory challenges rests with the Legislature, limited only by the necessity of having an impartial jury.' " *People v. Wheeler*, 22 Cal.3d 258, 281, n. 28 (1978); cf. *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988) (no denial of due process when one peremptory challenge used against a juror who should have been removed for cause: "the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides"). This Court has found the guarantee of equal protection violated when an incompetent criminal defendant has been detained for longer than allowed by the *civil* commitment laws, *Jackson v. Indiana*, 406 U.S. 715 (1972), and given its statement one century ago that the exercise of peremptory challenges is "one of the most important of the rights secured to the accused," *Pointer v. United States*, 151 U.S. 396, 408 (1894),

a level of "intermediate" – if not "strict" – scrutiny most closely responds to the fundamental liberty interests of the accused at stake in a criminal prosecution.

It is not necessary, however, to base rejection of the California courts' approaches to the equal protection issue posed by Cal. Code Civ. Proc. §§ 222.5 and 223 on a heightened standard by which that classification is subject to review. As this Court has emphasized,

> "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. *McLaughlin v. Florida*, 379 U.S. 184, 189-190. It also imposes a requirement of some rationality in the nature of the class singled out."

Rinaldi v. Yeager, 384 U.S. 305, 308-309 (1966). In other words, the distinction drawn between classes must "have some relevance to the *purpose* for which the classification is made." *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966) (emphasis added).

California authority, however, has yet to make a case for a rational basis to distinguish criminal and civil trial voir dire. The *Banner* court summarily rejected the equal protection claim simply because defendant had failed to establish any deficiency in the judge's voir dire, 3 Cal.App.4th at 1322; the *Boulerice* court ascribed a rational relationship to Proposition 115's "attempt to balance competing interests" following public dissatisfaction with cases that established parity in criminal and civil jury selection, 5 Cal.App.4th at 479-480; and *Leung* emphasized the legitimacy of the voters' decision to prevent abuse of the voir dire process in criminal cases, *id.* at 495-496. These reasons are illogical and inherently contradictory. *Banner's* required showing of deficient voir dire as a predicate to a facial equal protection challenge is just

plain wrong, and the *Boulerice* reference to periodic jury selection procedural reform hardly proves that the statutory classification is rationally related to a legitimate state purpose. The illusory quality of *Boulerice's* defense of the distinction is evident in that court's recognition that "[t]here is no doubt that trial court delays for both civil and criminal litigants have been and are perceived as a significant problem." 5 Cal.App.4th at 479. Indeed, with the exception of adding in the factors of "the interest of victims and witnesses in the timely resolution of the issues," *id.* at 480 – interests frequently present in *civil* cases as well – each and every one of the numerous "competing interests" said by that court to be "balance[d]" by Proposition 115, *ibid.*, are identical whether the action is denominated criminal *or* civil. (Parenthetically, *Boulerice* mentions that after the adoption of Proposition 115, alterations were promptly made in the appropriate statutes and rules to clarify that civil trials would be conducted as before. *Id.* at 475-476.)

Though perhaps more forthright, the reason given by the *Leung* court in finding a rational basis for the incongruency fares no better. First, the court treats at length a 1958 decision of the California Supreme Court which upheld a statute granting civil litigants the right to peremptorily challenge a trial *judge* but withholding that right from criminal litigants; the court inferred a legislative concern that the right would be abused if conferred in criminal cases, and concluded that the distinction between criminal and civil proceedings was rationally related to a legitimate state purpose. 5 Cal.App.4th at 495-496. *Leung* then blithely assumed that the distinction was "equally applicable" in the present context, citing language in a 1928 case. The resulting supposition that in

enacting Cal. Code Civ. Proc. § 223, some 62 years later, "the voters took a step towards preventing those abuses," by retreating from legislatively prescribed equality, is fanciful speculation not a reasoned distinction. No wonder the author of the *Boulerice* opinion, who as much as conceded that problems with trial court abuse existed in *both* the civil and criminal arenas, declined to join the majority opinion in *Leung*, as did *Leung's* author when he concurred in the result only in *Boulerice*.

As noted at the outset, the decision below simply cites the *Banner-Boulerice-Leung* trilogy and ratifies the conclusion "that the electorate did not make an irrational distinction in seeking to curtail the excesses of voir dire in criminal cases and the attendant harm of protracted trials and backlogged court systems." A4. None of those decisions, however, makes a legitimate case for distinguishing the "excesses" by criminal litigants as opposed to civil litigants, and none of the three even pretended to demonstrate that lengthy trials, heavy court calendars, and concerns for witnesses were unique to the criminal side. What may better explain this disparity is the practical problem arising from California's initiative system under which the voters, presented the appealing package of criminal justice and so-called victim reform measures in Proposition 115 – and *prevented* by the state constitutional requirement that initiatives relate to a single subject from addressing abuses in *civil* litigation at the same time – opted to undo the careful balance recently enacted in legislation and court rules. This basis for the distinction surely is an unreasoned one, but that is no solace to California criminal litigants because no further published decision from a California appellate court is likely to

address the serious equal protection problems thus created. The rubber-stamp approach of the present decision should not be the last word on this question of great importance.

CONCLUSION

Because the California Court of Appeal has failed to properly consider and decide these fundamental questions, and this Court's resolution and guidance is required as to each, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFIED FOR
PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND E. GODLEWSKI et al., Defendants and Appellants.	No. B055480 (Super.Ct.No. PA000304) (Filed Aug. 5, 1993)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed and modified.

Stephen Temko, Christopher Blake, and Dennis A. Fischer, under appointments by the Court of Appeal, for Defendants and Appellants.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Donald

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* Pursuant to California Rules of Court, rules 976 and 976.1, this opinion is certified for partial publication. The portions directed to be published are: Statement of Facts, The Trial Court Property [sic] Excluded Statements Godlewski Made to His Lawyer, and Disposition.

E. DeNicola and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Statement of Facts

Three defendants appeal following their convictions for murder. As none of the defendants directly raises a sufficiency of the evidence claim, we will briefly summarize, in accord with the traditional rule of appellate review (*People v. Johnson* (1980) 26 Cal.3d 557, 562), the operative events of this murder-for-hire case. Additional facts will be set forth as necessary to evaluate the specific assignments of error.

Raymond Godlewski, desiring to kill his father, hired Gene Flack to commit the crime. Flack enlisted Michael Brown's assistance. At approximately 12:30 a.m. on July 4, 1989, Brown drove Flack to the victim's home in Sylmar. Flack knocked on the door. When the victim answered, Flack murdered him with a single shotgun blast to the head. Brown drove Flack from the scene.

On July 5, 1989, Flack told Paul Caines that he had committed the murder. Caines notified the police. The police interviewed Flack and Brown but released them. Several days later, the police arrested Godlewski and Brown. Flack fled to Louisiana but was soon apprehended.

The three men were jointly charged and tried. However, one jury was impanelled for Brown and Flack while another jury was impaneled [sic] for Godlewski. At certain points, each jury was excluded during portions of the

People's case although both juries heard all of the defense evidence.

Godlewski testified and admitted hiring Flack to kill his father. He asserted that he had done so because of a lifetime of physical and emotional abuse suffered at his father's hands. Additionally, he claimed he was fearful of his father because of threats he had made shortly before his death. The jury apparently credited Godlewski's claim to a certain extent because, although charged with first degree murder with the special circumstances allegation of murder for financial gain, he was convicted only of second degree murder.

Flack testified and denied having committed the murder. He admitted only that he had purchased a shotgun for Godlewski. Flack claimed that it was Godlewski who actually shot the victim. The jury disbelieved Flack and found him guilty of first degree murder and found true the special circumstances allegation of murder for financial gain.

Brown did not testify and presented no defense. Essentially, he argued that the People's circumstantial evidence case against him did not establish guilt beyond a reasonable doubt. The jury disagreed and found him guilty of first degree murder. (The special circumstances allegation against Brown had been stricken before trial at the request of the People.)

The Trial Court Properly Conducted Voir Dire

In June 1990, the electorate passed Proposition 115. One of its provisions, enacted as Code of Civil Procedure

section 223, radically changed the law of voir dire in regard to criminal cases. The new statute provides that the court, rather than the attorneys, "shall conduct the examination of prospective jurors" and that the examination "shall be conducted only in aid of the exercise of challenges for cause."

At bench, trial commenced in July 1990. The trial court properly ruled that the new provisions would apply even though the murder had occurred prior to the passage of Proposition 115. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 299, 300.)

Flack and Brown contend that these provisions result in a denial of equal protection because the restrictions apply to criminal cases but not to civil cases.[1] This contention need not detain us as it has been extensively examined and rejected. (*People v. Boulerice* (1992) 5 Cal.App.4th 463, 477-480 [review den.]; *People v. Leung* (1992) 5 Cal.App.4th 482, 494-497 [review den.]; and *People v. Banner* (1992) 3 Cal.App.4th 1315, 1322-1324 [review den.].) Suffice it to note that we adhere to the view that the electorate did not make an irrational distinction in seeking to curtail the excesses of voir dire in criminal cases and the attendant harm of protracted trials and backlogged court systems.

Flack next contends that the statutory preclusion of the use of voir dire to exercise peremptory challenges is

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[1] Code of Civil Procedure section 222.5 grants counsel for a civil litigant "the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause."

unconstitutional. We disagree. As Brown concedes, the right to exercise a peremptory challenge is a statutory right, not a constitutional right. (*People v. Leung, supra,* 5 Cal.App.4th at pp. 491-494 and authorities cited therein.) Thus, limiting voir dire to eliciting information for challenges for cause does not violate the right to a fair and impartial jury "unless it can be shown on the facts of a particular case that the scope of voir dire was so narrow that it constituted an abuse of discretion." (*People v. Banner, supra,* 3 Cal.App.4th at pp. 1323-1324 and authorities cited therein.)

We therefore turn to the claim advanced by all three defendants that the trial judge's examination of the prospective jurors was so deficient as to warrant reversal.

The first jury impanelled was that for Flack and Brown. After overruling their objections to the application of Proposition 115 to the case, the court stated that it had reviewed Flack's Proposed Questions to Be Asked of Jurors in Voir Dire and that it would utilize four of them.[2] Those four questions asked if the juror could be fair and impartial and whether the juror or relatives or friends of the juror had been a victim of a crime, had been accused of a crime, or was involved in the criminal justice system. The court ruled that the other 27 proposed questions were improperly designed to elicit information to exercise peremptory challenges. The court noted that additionally all jurors would be asked about their area of residence, occupation, marital status, occupation of

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[2] The 31 Proposed questions are attached as an appendix to this opinion.

spouse and adult children, and prior jury experience. Lastly, the court stated it would inform the jury panel about the presumption of innocence, the People's burden of proof, and the privilege against self-incrimination.

The court then commenced voir dire. If a juror disclosed information that suggested he/she may not be able to be fair or impartial, the court asked further questions. Moreover, when counsel asked the court to pose follow-up questions, the court often did so.

During the process, defense counsel objected that the court's questions were not eliciting sufficient information to exercise their challenges for cause. Counsel did not suggest particular questions to be asked but instead asked for declaration of a mistrial and/or the right to conduct their own voir dire. In denying both requests, the court noted: "With all due respect to you I have made my decision utilizing my discretion, not only with five and a half years on the bench but eleven years as a trial lawyer myself, and I know what certain questions are worth and I have chosen not to ask those questions I did not ask, although I gave great weight to your proposed questions. In utilizing my discretion, I have chosen not to ask those questions, that it would not to me render any valid answers that go to cause."

Toward the end of the voir dire, both defense counsel declined to exercise any challenges for cause, alleging that they did not have information to exercise that right. However, at that juncture, they did not tender any follow-up questions for the court to ask the jurors. Shortly

thereafter, each party accepted the panel as constituted before exhaustion of all peremptory challenges.[3]

Before addressing the particulars of each defendant's arguments, we first set forth the applicable law which governs our analysis. As this division explained in *People v. Taylor, supra,* 5 Cal.App.4th 1299, the trial judge is in a better position than this court to ascertain the amount of voir dire necessary to ferret out potential bias and to judge the responses of the jurors. The trial judge's exercise of discretion with respect both to the particular questions to be asked and the areas to be covered in voir dire is entitled to considerable deference on appeal. Relying upon federal precedents, we concluded that the trial judge's findings on the issue of juror impartiality would be upheld absent a showing of manifest error and that the trial court's failure to ask specific questions will only result in reversal if the appellant demonstrates that the court abused its discretion by engaging in voir dire that was not reasonably sufficient to test the jury for bias or partiality. (*Id.* at pp. 1313-1314; see also *People v. Chaney* (1991) 234 Cal.App.3d 853, 861.)[4]

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[3] The defense's failure to utilize all peremptory challenges does not preclude them from raising on appeal the contention that the trial court unduly restricted the overall voir dire process. (*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1311, fn. 7.)

[4] On the issue of evaluating court-conducted voir dire, Code of Civil Procedure section 223 provides: "The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution."

Brown now urges: "The trial court's superficial and meaningless examination of the potential jurors failed to meet its constitutional obligation to secure a fair and impartial jury for [him] and his co-defendants."

Brown first points to the fact that the trial court failed to utilize all of the questions proposed by Flack and urges that some of them clearly "[went] to a potential challenge for cause." We disagree. The vast majority of the questions were of the type that are traditionally designed to glean information to exercise a peremptory challenge, not a challenge for cause. Included among those were questions inquiring about the jurors' club affiliations, gun ownership, and attitudes about the judicial system.

Brown's argument that "[a]ll of these things are designed to uncover hidden biases that *may* ripen into a challenge for cause" exposes the fallacy of his claim. (Emphasis added.) That open-ended possibility is not the standard for measuring whether the court conducted constitutionally sufficient voir dire. Brown has failed to demonstrate why those questions were constitutionally compelled in *this* case. (See *People v. Taylor, supra,* 5 Cal.App.4th at p. 1315.) Significantly, although Brown objected at several points to the voir dire, the objection was couched in the broadest generality. Although section 8.5 of the California Standards of Judicial Administration, entitled Examination of Prospective Jurors in Criminal Cases, provides that "[t]he trial judge may, upon a showing of good cause, permit supplemental examination calculated to discover possible bias or prejudice with regard to the circumstances of the particular case, relevant to a

challenge for cause," Brown never tendered specific questions which he felt should be asked at any point.[5] Contrary to Brown's claim, we do not believe such a request would have been a futile gesture. Having reviewed the record of the entire voir dire process, we are convinced that the trial court was committed to securing a fair and impartial jury. The court's voir dire embraced the essence of the questions suggested in section 8.5 of the California Standards of Judicial Administration. The court often made follow-up inquiries of potential jurors and on several occasions agreed to pose additional questions when defense counsel firmly articulated the need therefor. In sum, Brown has not demonstrated, either in the trial court or in this court, that good cause existed necessitating supplemental examination of the jurors.

To the extent that Flack's attack on the voir dire examination tracks Brown's attack, we reject his claim of error for the same stated reasons. To the extent that Flack focuses on the manner in which the court posed its follow-up questions to potential jurors, we also find no prejudicial error. For instance, Flack points to the fact that after the court had learned that a potential juror had been the victim of the crime or had relatives in law enforcement, the court would ask if there was anything in that fact which would cause the person to be other than a fair and impartial juror. Flack argues that such an inquiry was

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[5] Brown's reliance upon the fact that the court denied the *prosecutor's* request to ask follow-up questions to two jurors is unavailing. Whether or not the trial court's disallowance of the questions was proper is a moot point; neither of the two jurors sat on the jury.

inadequate because it called for a "yes" or "no" answer. He asserts that instead the court should have asked an open-ended question. As we noted in *People v. Taylor, supra,* 5 Cal.App.4th at pages 1315-1316, while open-ended questions may be helpful, there is no authority for the proposition that they are constitutionally required in order to eliminate the possibility of bias. In sum, Flack has failed to show that the court's manner of inquiry impaired his constitutional right to a fair and impartial jury. (See also *People v. Chaney, supra,* 234 Cal.App.3d at pp. 862-863.)

Prior to commencing voir dire for Godlewski, the court overruled his objection to employing the provisions of Proposition 115. After the court explained that it would use the same questions utilized in the voir dire for codefendants Flack and Brown, counsel tendered three additional questions he wanted asked. The first question was whether the prospective jurors could treat Godlewski fairly because he was charged with killing his father. The court agreed to ask the question, stating that it was "proper" as that fact "would interfere with any juror's fairness or impartiality." The second proposed question was "whether or not the aspect of a hiring or killing for hire would preclude any juror from a consideration of any lesser than first degree homicide because some of them may have a closed mind and be predisposed to believe that any killing for hire automatically was a first." As Godlewski intended to present psychiatric testimony to support his defense that his intent to kill was mitigated by his father's lifelong emotional and physical abuse of him, his third question was whether any potential juror harbored a bias against psychiatric testimony. In regard

to the latter two questions, the court ruled: "As far as the killing for hire and expert psychiatric testimony, I decline your invitation to inquire in that area. . . . And I do not find sufficient cause based upon your offer of proof to inquire as to those areas."

During the voir dire, counsel objected because the question about bias arising out of the fact that Godlewski had killed his father was being posed to the jurors as a group as opposed to individually. Counsel argued that "it would take more than a collective question to the group at large to determine whether any of them had implied bias [on that basis]." Counsel also attacked the overall sufficiency of the voir dire but did not tender specific questions he wished the court to use other than note that it would be helpful to ask the jurors about their abilities to apply certain legal principles.[6] The court denied the request for further questioning. Although counsel renewed his overall objection several more times, he never asked for specific questions to be posed.

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[6] Counsel argued: "There are also the other areas of bias in terms of relationship with the parties that the court did not inquire into. But primarily in the area of implied bias the court did not ask them any questions other than would they be fair and the court didn't inquire in terms of their ability to apply certain concepts of law, burden of proof, reasonable doubt, other areas in which they in the abstract answered they would be fair. But when they were presented with what they needed to be fair about their answers might be different. I think that they might be unable to apply those burdens. [¶] That would be my questions and comments with regard to the [voir dire of the] entire 18."

Later on, defense counsel noted that the case had initially received media coverage and requested a voir dire question on that point. The court agreed to ask a question in that vein. Additionally, the court acquiesced in a prosecutorial request to ask a question about the possible use of graphic photographs of the victim.

Godlewski first attacks the trial court's failure to ask his question about potential bias against psychiatric testimony.[7] *Ham v. South Carolina* (1973) 409 U.S. 524 provides a good example of what type of showing is required before an appellate court will conclude that there was a constitutional imperative to pose particular voir dire questions. There, the defendant was a well-known Black civil rights activist who alleged the police had framed him because of his political actions. Given that context, the United States Supreme Court concluded that a voir dire question about racial prejudice was constitutionally compelled.

Similarly, in *People v. Chapman* (1993) 15 Cal.App.4th 136 (review den.), the Court of Appeal found the trial court had abused its discretion in refusing to pose any questions on a particular topic because of the particular circumstances in the case. There, one of the two crimes charged against the accused was that of being a felon in possession of a firearm. The trial court would not ask any voir dire questions about whether the jurors would feel any bias or prejudice against the accused solely due to his

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[7] Godlewski concedes that his conviction for *second* degree murder demonstrates that he was not prejudiced by the court's refusal to ask whether the charge of *first* degree murder would preclude a juror from considering his guilt of a lesser offense.

prior felony conviction. Noting that "[i]t is well recognized that there may be members of a jury panel who feel that because a defendant has a criminal record it is more likely that he . . . is guilty of the offense charged" (*Id.* at pp. 142-143), the Court of Appeal concluded that the trial court had erred in barring any such questions. Without some inquiry on the matter, the trial court was unable to fulfill its obligation to remove prospective jurors who would be unable to impartially view the evidence.

In contrast, Godlewski has failed to demonstrate that the possibility of prejudice arising out of the fact pinpointed by his question – use of psychiatric testimony – was sufficiently real so that the court was *required* to ask the questions. We do not believe that the mere potential for antipathy toward psychiatric testimony, if any, is the type of special circumstance which requires voir dire questions. (See *Ristaino v. Ross* (1976) 424 U.S. 589, 598.) Distrust of psychiatry is a far cry from animosity based upon the accused's race or status as an ex-felon. It is not an issue that is so inextricably bound up with the conduct of the trial that failure to voir dire on it results in deprivation of a fair and impartial jury. Essentially, Godlewski confuses the fact that it may have been helpful to ask the question with the issue of whether the court was required to ask the question. "To be constitutionally compelled, however, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair. [Citation.]" (*Mu'Min v. Virginia* (1991) 114 L.Ed.2d 493, 506.)

Godlewski also complains because, instead of individually asking each juror about potential bias arising

from the fact that Godlewski was accused of killing his father, the trial court posed that question to a group of potential jurors. The claim is meritless. It was the trial court's function to determine how to elicit the information which could support a challenge for cause. Godlewski's argument that posing an individual question would be more likely to unearth potential bias is necessarily speculative and, in any event, does not equate with a constitutional requirement to pose the question in a certain manner. The trial court retains the discretion to question the venire individually or collectively. (*Turner v. Murray* (1986) 476 U.S. 28, 37.)

Lastly, we reject Godlewski's contention that the entire voir dire process was deficient. To the extent that he urges that the trial court should have posed additional questions, the claim is unconvincing for two reasons. First, as already explained, the court did not err in rejecting his question about psychiatric testimony. Second, although Godlewski objected during the voir dire, he never suggested any specific question other than the inquiry about pretrial publicity, a question the court agreed to use. As such, he is hard-pressed to now claim that the court should have asked more questions.

To the extent that Godlewski urges the voir dire was so "perfunctory" as to be constitutionally infirm, the record belies his characterization of the process. As we noted in regard to the similar claim made by codefendants Brown and Flack, the court's voir dire covered the majority of the issues suggested by section 8.5 of the California Standards of Judicial Administration. Prior to the commencement of voir dire, the court agreed to pose an additional question tendered by Godlewski. During

the voir dire, the court agreed to use another two questions because the proponents thereof demonstrated good cause. Additionally, throughout the voir dire, whenever a potential juror disclosed information which could potentially create bias, the court asked follow-up questions. In sum, the voir dire process was reasonably sufficient to test potential jurors for bias and partiality.

The Joint Trial of Brown and Flack Was Proper

As noted earlier, one jury heard the case against Brown and Flack and another jury heard the case against Godlewski. Brown and Flack now contend that the trial court erred in not impaneling a separate jury for each of them.

Flack Has Not Demonstrated Bruton Error

Flack first contends that a violation of *Bruton v. United States* (1968) 391 U.S. 123 occurred based on the following. Mikki Bei, a prosecution witness, testified that she telephoned Brown at approximately 5 p.m. on July 3, 1989, and asked about his plans for that evening. Brown told her that he and Flack were "going to do something but he couldn't tell [her]" anything else except he did disclose $3,000 was involved.[8] Although the court

[8] Bei testified that when Brown did not respond to her entreaties to explain his activity, she mentioned several illegal acts (e.g., auto theft, battery, murder). As a result, at one point Brown said he was going to steal a car but Bei testified she had not believed that.

overruled Flack's objection to Bei's testimony,[9] it did instruct the jury at that point that "this statement is limited solely to defendant Brown and is not to be used by you as against any of the other two defendants."[10]

Pointing to the fact that later in the trial several witnesses testified that Flack confessed having murdered the victim, assisted by an unidentified man who drove the getaway car, Flack argues that Brown's extrajudicial statement incriminated him because it suggests that on the evening of July 3, 1989, he and Brown had killed the victim for $3,000. Because Brown did not testify at trial, Flack contends that Bei's testimony about Brown's statement denied him the right to confront and cross-examine his accuser (Brown). As such, he urges that the trial court erred in rejecting his requests to either redact the reference to him in the statement or to impanel a separate jury to hear his case.

Bruton v. United States, supra, 391 U.S. 123, held that a defendant's Sixth Amendment right to confront and cross-examine is denied by the introduction into evidence at a joint trial of a statement made by a nontestifying

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[9] In denying Flack's pretrial motion made on identical grounds, the court had found "that the statement is not inculpatory on its face. [¶] . . . [and] with the limiting instruction as required by *Marsh* [*Richardson v. Marsh* (1987) 481 U.S. 200], which I will give as to that statement as well, there is no prejudice as to defendant Flack. The statement will be given unredacted."

[10] At the close of trial, CALJIC No. 2.07 (Evidence Limited to One Defendant Only) and CALJIC No. 2.09 (Evidence Limited as to Purpose) were submitted to the jury.

codefendant which incriminates the nondeclarant codefendant.

At bench, Brown's extrajudicial statement did not clearly inculpate Flack because on its face the statement is ambiguous. The statement made no reference to criminal conduct. The statement only became potentially incriminating when viewed in conjunction with other testimony. As such, it is not at all clear that Bei's testimony impinged upon the interest protected by *Bruton*. (See *People v. Epps* (1973) 34 Cal.App.3d 146, 156-158, overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122-1123.) Furthermore, the court's submission of the limiting instruction, which presumptively the jury followed, adequately protected Flack.[11] (See *Richardson v. Marsh* (1987) 481 U.S. 200.) Nonetheless, assuming arguendo that error did occur, it was not prejudicial. "[I]f the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless." (*People v. Anderson, supra*, 43 Cal.3d at p. 1129.) As we shall set forth in more detail (*post*, at p. 25), the evidence against Flack was overwhelming. At this point it is sufficient to merely note that four people testified that he admitted having committed the murder. Given that evidence, any error caused by the admission of Bei's testimony was patently harmless.

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[11] When the prosecutor first mentioned Bei's testimony in his closing argument, he directed the jury's attention to the instruction which precluded use of the statement against Flack.

Brown Cannot Establish Bruton Error

Brown contends that he should have been granted a separate trial because testimony from witnesses about Flack's extrajudicial statements violated his (Brown's) right to confront and cross-examine. The claim is meritless. None of these extrajudicial statements directly identified Brown as the driver of the getaway car. Moreover, the trial court instructed the jury that the statements were to be used only against Flack. Lastly, no constitutional violation could have occurred because Flack testified at trial and thus was subject to cross-examination by Brown.[12] Although some decisions from the California Courts of Appeal had found that the constitutional right to confront and cross-examine was violated by the introduction of extrajudicial statements made by a codefendant even if the declarant codefendant ultimately testified at a joint trial, the United States Supreme Court held to the contrary in *Nelson v. O'Neil* (1971) 402 U.S. 622. However, *People v. Boyd* (1990) 222 Cal.App.3d 541, 560-563 (review den.), concluded that the 1982 passage of Proposition 8 mandated application of the federal rule set forth in *Nelson* and thus had abrogated the contrary California decisions. (Accord: *People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1407; but see *People v. Mitcham* (1992) 1 Cal.4th 1027, 1045, fn. 6.) Consequently, as there is no federal constitutional basis for Brown's present claim, the trial court did not err in denying his request for a separate trial.

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[12] Brown, however, chose not to cross-examine Flack.

The Joint Trial of the Three Defendants Was Proper

As noted earlier, Godlewski testified that he hired Flack to commit the murder and that Flack and Brown carried out the crime. Godlewski's defense was that he had been provoked into arranging for his father's murder both because his father had abused him throughout his life and because his father had recently threatened him. Flack, on the other hand, testified that Godlewski had approached him about the killing; that he (Flack) obtained a shotgun for Godlewski; and that Godlewski then committed the murder. Brown did not testify but the thrust of his case was that there was a reasonable doubt as to his identity as the driver of the getaway car.

Brown and Flack now contend that notwithstanding the fact that a separate jury was impanelled for Godlewski, it was error to allow their jury to hear Godlewski's defense. Flack urges this procedure resulted in prejudicial error because he and Godlewski each accused the other of committing the murder. He maintains that permitting the jury to hear the antagonistic and inconsistent defenses deprived him of due process of law.[13] Brown argues that Godlewski's testimony improperly bolstered what was otherwise a weak case against him.

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[13] Flack also urges that because he had no right to discovery of any aspect of Godlewski's defense, he "was thereby denied his right to reciprocal discovery guaranteed by both the federal and California Constitutions." However, in the trial court, Flack expressly disavowed any right to seek discovery from Godlewski. Thus, the issue has not been preserved for appellate review.

Because the three defendants were charged with a singular murder, this was a classic case for a joint trial. (*People v. Keenan* (1988) 46 Cal.3d 478, 499-500.) A joint trial is not unfair merely because codefendants have antagonistic defenses and one defendant gives testimony damaging to the other and thus helpful to the prosecution. (*People v. Turner* (1984) 37 Cal.3d 302, 313.) If the fact of conflicting defenses alone required separate proceedings, the legislative preference, embodied in Penal Code section 1098, for joint trials would be negated and separate proceedings would be mandatory in almost every case. (*Id.* at pp. 312-313.) Consequently, it is not surprising that "[a]lthough several California decisions have stated that the existence of conflicting defenses may compel severance of codefendants' trials, none has found an abuse of discretion or reversed a conviction on this basis." (*People v. Boyde* (1988) 46 Cal.3d 212, 232.)[14]

For instance, in *People v. Turner, supra,* 37 Cal.3d 302, Turner and Souza were jointly charged with robbery and murder. Souza testified that Turner was the killer and that he (Souza) had participated in the robbery out of fear of Turner. Turner did not testify and did not present any defense. One jury found both defendants guilty. The Supreme Court rejected Turner's contention that the joinder was error because Souza's defense had been adverse to him and had helped the prosecution.

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[14] In *Zafiro v. United States* (1993) 122 L.Ed.2d 317, the United States Supreme Court reached very similar conclusions in analyzing whether the Federal Rules of Criminal Procedure required severance as a matter of law when Codefendants present mutually antagonistic defenses.

In *People v. Boyde, supra,* 46 Cal.3d 212, Boyde and Ellison were jointly charged with robbery and murder. A jury was impanelled for Boyde and the court determined Ellison's culpability. Ellison testified, denied any criminal intent, and claimed that Boyde initiated and committed all of the crimes. To rebut Ellison's testimony, Boyde took the stand and placed primary blame for the robbery on Ellison and complete responsibility for the murder on Ellison. Both defendants were found guilty. The Supreme Court rejected Boyde's claim that the joinder denied Boyde a fair trial or in any way unfairly prejudiced him.

Lastly, in *People v. Wallace* (1992) 9 Cal.App.4th 1515 (review den.), Wallace and Pitts were jointly charged with murder. Before the jury, each testified and accused the other of shooting the victim. The jury convicted Wallace and acquitted Pitts. Relying upon *People v. Hardy* (1992) 2 Cal.4th 86, the Court of Appeal found no error in the joinder. It reasoned: " 'Each defendant presented a theory of the case that absolved himself of guilt and focussed blame on the other[]. The jury was thus presented with a straightforward choice regarding the credibility of the various defendants.' [Citation.] . . . That the choice was adverse to Wallace's interests does not, without more, support reversal of the jury's verdicts." (*People v. Wallace, supra,* 9 Cal.App.4th at p. 1520.)

In light of these precedents, we reject the claim of error advanced by Brown and Flack. This case involved one murder. The events preceding, during, and following the commission of the crime involved all three men. As we shall explain, the People presented a very strong case-in-chief against both Flack and Brown. Thus, this was not

a situation in which the prosecutor sat back and let the defendants convict each other.

In regard to Flack, four people testified that he told them that he had committed the murder. Paul Caines testified that on July 5, 1989, Flack told him that "somebody's son" paid him $5,000 to kill that person's father. Caines testified that Flack explained to him that the murder had occurred in Sylmar and that he (Flack) had walked up to the front door of the home, shot the victim, and then fled in a car. Additionally, Glenn Viola, Carl Viola, and Crystal Rachal testified that while in Louisiana, Flack had told each of them that he had committed the murder. Many of the details about the actual commission of the crime supplied in Flack's confessions to the latter three were corroborated by physical evidence. Thus, the evidence of Flack's guilt, as set forth in the People's case-in-chief prior to Godlewski's testimony was, to say the least, overwhelming.[15]

In regard to Brown, the People set forth a very strong circumstantial evidence case. The prosecution established that Brown, Flack, and Godlewski met on the afternoon of July 3, 1989. Later that day, Brown told Bei that he and Flack would be doing something for which they would be paid $3,000. Brown refused to tell Bei what their action would be. Flack left his home in Brown's automobile. On two occasions several hours before the murder was committed, Brown's car was seen driving by the victim's

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[15] Flack did not move for judgment of acquittal following the completion of the People's case-in-chief (Pen. Code, § 1118.1) because he felt "they have a prima facie case against" him.

house. Lastly, it was Brown's car, with its headlights off, which sped away from the scene of the murder at 70 miles per hour.

Several days after the murder, Brown bought a waterbed for $350 and jewelry for $100, paying for both purchases in cash. Shortly after he and Flack were questioned by the police on July 14, 1989, they discussed going to Mexico.[16]

Given the strength of the People's case, Brown and Flack err in urging that the People took improper advantage of Godlewski's inculpating testimony. Moreover, when Godlewski did testify, each of them cross-examined him.

Finally, the use of dual juries negated the possibility that *one* jury would be presented with the dilemma that acceptance of one defendant's defense would preclude acquittal of the other(s).[17] Because a separate jury had been impanelled for Godlewski, the prosecutor did not argue Godlewski's guilt to the Flack/Brown jury nor did counsel for Godlewski argue to the Flack/Brown jury. The Flack/Brown jury only had to determine the guilt of those two. The other jury, deliberating separately, was limited to deciding Godlewski's guilt.

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[16] Brown moved for judgment of acquittal but the court denied the motion.

[17] We note, however, that *People v. Wallace, supra*, 9 Cal.App.4th 1515, would appear to indicate that said possibility does not automatically render improper the use of one jury for two defendants.

In conclusion, we believe that there is much force to the following observations made by the *Wallace* court in rejecting a similar claim of error. "In other words, while joint trial of defendants who each accuse the other does pose problems, the complaint is that too much rather than too little truth might emerge in the process. While joint defendants might prefer otherwise, this dilemma may serve the public interest in accurate ascertainment of guilt or innocence. . . . " (*People v. Wallace, supra,* 9 Cal.App.4th at p. 1520, fn. 4.; see also *Ware v. Commonwealth* (Ky. 1976) 537 S.W.2d 174, 177, cited with approval in *People v. Hardy, supra,* 2 Cal.4th at p. 169, fn. 19 [" 'That different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they participated in it, vel non, is a reason for rather than *against* a joint trial. If one is lying, it is easier for the truth to be determined if all are required to be tried together.' "].)

The Alleged Violation of Brown's Statutory Right to a Speedy Trial Does Not Entitle Him to a Reversal of His Conviction

Insofar as is pertinent, Penal Code section 1382, subdivision (a)(2)(B) provides that a case must be dismissed if trial does not commence within 10 days of the date set for trial unless the court makes a finding that there is good cause to continue the matter. Over objection, Brown's trial was continued several times because Godlewski's attorney needed additional time to prepare. The trial court denied Brown's dismissal motions and this court summarily denied two writ petitions challenging

those rulings.[18] Brown now urges denial of his dismissal motions was error which warrants reversal.

The relevant chronology is as follows: At a pretrial conference, a trial date of February 26, 1990, was selected. On February 26, 1990, counsel for Brown appeared and filed his severance motion. Counsel for Godlewski, a deputy public defender, moved for a continuance because he was then engaged in another trial *and* needed "additional time to prepare for this complex case." Counsel for Flack stated he had no objection to the continuance and "could use the further time for preparation [himself]." The prosecutor opposed Brown's severance motion but stated the matter should be continued. The court deferred ruling and continued the matter to March 2, 1990.

On March 2, 1990, counsel for Godlewski reiterated that he was still engaged in another matter and needed further time to prepare for this case. Counsel for Flack announced ready for trial. Counsel for Brown argued his severance motion which the trial court denied. The trial court found good cause to continue the joint trial because Godlewski's attorney needed further time to prepare and was presently unavailable to try the matter. The court set trial for April 23, 1990. As this date was more than 10 days after February 26, 1990, counsel for Brown moved for a dismissal. The court denied the motion.

On April 23, 1990, all parties and counsel appeared. Counsel for Godlewski sought another continuance

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[18] The summary denial of those petitions cannot, of course, be considered the law of the case. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 899; *People v. Medina* (1972) 6 Cal.3d 484, 489-490.)

because he needed further time to investigate and prepare his client's defense due to the complexity of the case. Additionally, he was trailing for trial in another courtroom. Counsel for Brown objected to a continuance and renewed his request for separate trials. In response to an inquiry from the court, counsel for Godlewski stated he could be ready on June 25, 1990.[19] The court granted the continuance[20] and denied Brown's renewed requests for severance and dismissal.

On June 25, 1990, all counsel appeared. Counsel for Godlewski sought another continuance but the court denied the request, and trailed the matter to July 2, 1990.

On July 2, 1990, over Brown's objection, the court continued the matter to July 9, 1990, because counsel for Flack was engaged in another trial.

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[19] He averred, in part, that within the last two weeks, he had "received information from the People regarding a witness, a very important, material witness to Mr. Godlewski's case, who was interviewed in Texas, or he lives in Texas, back in September of last year. We just received that, so there is new information, and it must be investigated." He also represented that there were other needs necessitating a two-month continuance but "for obvious reasons, I would not discuss them here in open court."

[20] The court stated, in part: "I assume that Mr. Lezin's [counsel for Godlewski] position is that it is in the best interest of his client, as he indicates, to conduct further investigation, and as he indicates, follow-up, extensive follow-up investigation. [¶] I don't know his theories. I don't know anything about what he has done, but if he feels it is in the best interest of his client that he move for a continuance by reason of the need for further investigation, I think that is a good reason to do that."

On July 9, 1990, the matter was sent to a trial court. As counsel for Flack was still engaged, the trial judge set the matter for July 16, 1990, and denied Brown's motion to dismiss. On July 16, 1990, jury selection commenced.

On this appeal, Brown expends much energy arguing that good cause did not support the trial court's grant of counsel for Godlewski's requests for continuances. Whether the need of a codefendant's counsel for additional time to prepare constitutes good cause to continue the matter is an issue which has been subject to diverse analyses. (See, e.g., *People v. Teale* (1965) 63 Cal.2d 178; *Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487; *Hollis v. Superior Court* (1985) 165 Cal.App.3d 642; and *Sanchez v. Superior Court* (1982) 131 Cal.App.3d 884.) The procedural posture of this case militates against our even entering into that debate. That is, because this is a post-conviction appeal as opposed to an effort to obtain pre-trial relief via a writ petition, the accused must show not only that the trial court erred in continuing the case over his objection but that he has been prejudiced by the denial of his statutory right to a speedy trial. (*People v. Johnson, supra,* 26 Cal.3d at p. 574.) Consequently, even were we to assume that it was error to deny Brown's dismissal motions, we must still "weigh the effect of the delay in bringing defendant to trial or the fairness of the subsequent trial itself." (*People v. Wilson* (1963) 60 Cal.2d 139, 151.) We shall conclude that Brown has failed to demonstrate prejudice.

Brown first urges that had the trial court denied the motion to continue, the trial would have commenced prior to June 1990 when Proposition 115 became effective. From this, he argues that he would have been entitled to

conduct a much more expansive voir dire than was ultimately done. That circumstance does not in any manner affect the ultimate fairness of the trial. As we have already explained, the court-conducted voir dire sufficiently implemented Brown's constitutional right to a fair and impartial jury.

Brown also argues that had the court protected his right to a speedy trial by severing his trial from that of Godlewski, then his jury would not have suffered the alleged prejudice of hearing Godlewski's defense. Suffice it to note, we have already rejected the claim that any impermissible prejudice arose from the joinder.

In sum, Brown has not shown any cognizable prejudice. Significantly, he has not even suggested that the delay in any way impaired his ability to present a defense. Moreover, this is not a case in which the dismissal would have barred a refiling of the charges. (Pen. Code, § 1387.) Lastly, while it is true that Brown remained in custody pending commencement of trial, he received full credit for that time.

The Trial Court Properly Denied Brown's Motion to Exclude His Statements to Officer Saurman

Brown urges that the trial court erred in denying his motion to exclude several statements made to Los Angeles Police Officer Saurman. Brown had argued that Saurman's conversation with Brown was the functional equivalent of an interrogation so that Saurman's failure to give the *Miranda* admonitions warranted exclusion of his statements.

At the hearing conducted pursuant to Brown's motion, Saurman testified that on July 19, 1989, he interviewed Brown, who was in custody on the murder charge, in order to complete a Form 510. A Form 510 merely seeks personal information about the suspect, such as data about his or her family, employment, school attendance, etc. It is usually completed shortly after the suspect has been booked. The form makes no inquiries about the charged offense(s).

Brown does not contest that *Miranda* does not apply to this bare-bones information gathering. (See, e.g., *People v. Hall* (1988) 199 Cal.App.3d 914, 919-921.) Instead, his complaint is based upon what happened during the interview. At one point, Brown asked Saurman "what this is all about." Saurman responded: " 'Do you know what you are in here for?' " Brown replied: " 'Not really' [and then] said something about a murder and driving a car, driving a car and a murder." Saurman, surprised that Brown did not appear to comprehend the nature and seriousness of the charge, told him, in a tone which evinced his surprise: " 'Well, you are in a lot of trouble. This is a first-degree murder case with special circumstances and that means that you could get the death penalty or it's a death penalty case.' " By conveying this information, Saurman had not intended to evoke any particular response from Brown.[21] Brown responded:

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[21] On cross-examination, Brown's lawyer asked Saurman: "Did you also feel that by telling Michael Brown that it would cause him to make a statement to you?" Saurman replied: "I hadn't really thought about it. I mean it wasn't – I hadn't preplanned my conversation with him. It was just the way it happened."

" 'Well, they didn't explain that to me or I would have told them what happened.' " (Brown apparently was referring to an earlier police interview, the contents of which are not disclosed.)

Saurman then advised Brown that if he wished to talk about it, he would advise him of his constitutional rights and interview him. Brown said that he would tell him what had happened but asked if Godlewski was in jail. Saurman informed Brown that Godlewski was in custody. Brown asked to speak to Godlewski. Saurman took Brown to Godlewski and the two had a brief conversation. Shortly thereafter, Saurman terminated his conversation with Brown.[22]

The thrust of Brown's argument is that Saurman's response about the seriousness of the pending charge was the functional equivalent of interrogation so that Saurman's failure to advise him of his *Miranda* rights precluded the People's use of Brown's subsequent statements. We disagree. The seminal decision of *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-302, held that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on

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In later arguing the motion, Brown stated, in part: "I don't doubt for one minute Officer Saurman's sincerity that he wanted to advise Michael [Brown] what he was facing. I'd adopt that as true. I'd have no reason to disbelieve Officer Saurman in that."

[22] The trial court instructed Saurman that he could not tell the jury that Brown ended the conversation because he wished to speak with counsel.

the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . . A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." (Emphasis in original; fns. omitted.)

Applying this standard to Saurman's conversation with Brown, we conclude that the trial court properly denied his motion to exclude Saurman's testimony. The pivotal issue was whether Saurman should have known that his response would move Brown to give incriminating answers. It is undisputed that the genesis of the exchange was Saurman's effort to obtain routine information. In that context, Brown asked about the nature of the charges. Saurman gave an accurate answer and, in so doing, had no intent to elicit incriminating information.[23] Brown's responses followed. The entire conversation was brief. Contrary to Brown's claim, we find nothing particularly evocative in the fact that a portion of Saurman's answer included reference to the true fact that the crime

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[23] The officer's intent is not irrelevant "for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." (*Rhode Island v. Innis, supra,* 446 U.S. at pp. 301-302, fn. 7.)

was potentially a capital offense. As Saurman's response to Brown's question was not the functional equivalent of interrogation (see, e.g., *In Re Curt W.* (1982) 131 Cal.App.3d 169, 177-181), the trial court did not err in denying Brown's motion to exclude Saurman's testimony about his statements.[24]

The Trial Court Properly Excluded Statements Godlewski Made to His Lawyer

Flack contends that prejudicial error occurred because the trial court ruled inadmissible, based upon the attorney-client privilege, statements made by Godlewski to his lawyer. Flack characterizes the statements as an admission by Godlewski that he (Godlewski), not Flack, actually committed the murder.

The issue arose during trial. Flack proposed to call as a witness Steve White, a county jail inmate, who allegedly overheard a conversation between Godlewski and his lawyer in the "lockup" on the day of Godlewski's arraignment in the superior court. Flack's offer of proof consisted of a written statement prepared by Flack's investigator who had spoken with White. White apparently signed the statement under penalty of perjury. Flack did not offer the statement into evidence. Instead, he read it to the court as follows:

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[24] As no evidence was introduced at trial about what Brown had told the police in his first interview, Brown's response that " 'Well, they didn't explain that to me or I would have told them what happened' " lacks a certain context. This, no doubt, explains why the prosecutor made little reference to Saurman's testimony in his closing argument.

"The statement by the witness was that he heard the attorney say 'You would have been better off saying that you did it instead of blaming it on these guys.

" 'Then Ray [Godlewski] said, 'You are right. That's what I'm going to tell them, that I did it, not these guys.'

" 'The attorney then said, 'You got yourself in deeper trouble and are going to have to straighten it out.'

" 'Ray [Godlewski] said he talked to Gene [Flack's] grandmother this morning and she said not to have someone else go down for something they didn't do.' "

Godlewski asserted the attorney-client privilege. Flack responded that the privilege had been waived because the conversation had taken place in the presence of a third person (White). The court found no waiver[25] and sustained the assertion of the privilege.[26]

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[25] The court stated, in part: "Now all counsel realizes how the lockups are here, that there are holding cells and then there are little seats, cubicles, in which the attorney is on one side of a mesh screen, strike that, the defendant would be on the other side. The fact that there are other people in the holding cell, and understanding there is just no other place to have an attorney-client conversation, I don't feel that the person, because a person engages in such conversation, is deemed a waiver of the privilege. Had the person, the defendant, talked to other suspects outside an attorney conference that would be another story."

[26] Flack thereafter argued that there was no evidence that Godlewski had been speaking to his attorney. The court then conducted a brief in-camera hearing with Godlewski's counsel, following which it reiterated its ruling upholding the privilege. We have reviewed the sealed transcript of that hearing and conclude that it contains substantial evidence to uphold the trial

Several days later, Flack renewed his motion to permit White to testify. Arguing that the evidence was so significant to his case that its exclusion would deny him a right to a fair trial, he asked the court to engage in a balancing process in deciding whether or not to uphold the claim of privilege. To explain the importance of White's proposed testimony, Flack pointed to the following testimony given by Flack's grandmother (Emma Baugh) and mother (Elizabeth McLemore).

Baugh had testified that during a phone conversation with Flack placed from the county jail following the defendants' arrests, Flack had another man come to the phone. The individual identified himself as "Ray, Jr." He admitted that he had personally killed the victim, and promised to exonerate Flack and Brown. Baugh conceded she did not recognize the voice and Godlewski, in his subsequent testimony, denied Baugh's allegations about the conversation.

Likewise, McLemore testified that during a phone conversation with Flack, Flack brought a man he identified as "Ray" to the phone. McLemore did not recognize the voice. However, "Ray's" "confession" to McLemore was different from the one allegedly given to Baugh in that "Ray" told her that he had *accidentally* killed his father.

Flack urged that White's testimony was necessary to corroborate the phone conversations to which Baugh and McLemore had testified. Flack also renewed his earlier

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court's finding that no waiver of the attorney-client privilege occurred.

argument that Godlewski had waived the privilege by conversing with counsel in the "lockup." Flack averred that law enforcement personnel and criminal defense attorneys had told him that there was a policy that if a lawyer asked to speak to a client in privacy, the request would be accommodated. Flack offered to call these individuals as witnesses if the court so desired. Godlewski did not quarrel with the existence of the policy but noted that practically, there is neither the time nor the opportunity to arrange for such private interviews.

Lastly, Flack proposed that Godlewski's rights could be accommodated by permitting White to testify only in front of the Flack-Brown jury. With that procedure, the Godlewski jury would never learn of the statement. Godlewski had earlier rejected this "offer."

The court again denied Flack's request. It found that the attorney-client privilege was an integral part of the federal constitutional right to counsel and that the privilege should be liberally construed. It rejected the option of disclosing the statement only to the Flack-Brown jury. However, the court did grant Flack's request to preclude the People from arguing to the jury that there was no corroboration for the testimony of either Baugh or McLemore.

Flack now contends that the trial court erred in barring White's testimony. We disagree for we conclude that only the most extraordinary circumstance would justify disclosure of privileged communications between lawyer and client and that Flack failed to make that showing.

The attorney-client privilege, albeit a statutory one, is the oldest of the confidential communications privileges. (*Sullivan v. Superior Court* (1972) 29 Cal.App.3d 64, 71.) Its purpose is to safeguard the confidential relationship between a client and counsel so as to promote full and open disclosure of facts and tactics surrounding the case. (*People v. Flores* (1977) 71 Cal.App.3d 559.) These benefits justify the risk that an unjust decision may sometime result because the privilege suppresses relevant evidence. (*People v. Canfield* (1974) 12 Cal.3d 699, 705.) In the context of condemning governmental conduct which had invaded the attorney-client relationship, our Supreme Court held that the attorney-client privilege helps to implement the accused's constitutional right to effective representation because "if an accused is to derive the full benefits of his right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney." (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 751; see also *Neku v. U.S.* (D.C.App. 1993) 620 A.2d 259, 262 ["In the criminal context the privilege acquires Sixth Amendment protection. (Citation.)"])

Given this policy framework, it is not surprising that the California courts have not yet embraced Flack's position. In *People v. Flores, supra*, 71 Cal.App.3d 559, an accomplice, testifying pursuant to a grant of immunity, gave the "most damning" (*id.* at p. 565) evidence against the defendant. The defense sought to cross-examine the accomplice about discussions he had with his attorney prior to the grant of immunity. The trial court barred the questioning after the witness invoked the attorney-client privilege. On appeal, the defendant "in his argument

against the use of the attorney-client privilege, contend[ed] that fundamental principles of social justice demand that help be extended by the courts in such circumstance to protect a defendant from a possible conviction predicated upon the biased and self-serving testimony of a witness." (*Id.* at pp. 564-565.)

The Court of Appeal rejected the request to breach the privilege. "The privilege of confidential communication between client and attorney should not only be liberally construed, but must be regarded as sacred. Courts should not whittle away at the privilege upon slight or equivocal circumstances. The grant of immunity and [the accomplice's] testimony admitting his complicity in the crime are not facts of such compelling force to require a waiver of the confidential nature of the attorney-client communication; its confidentiality must be kept inviolate. [Citations.]" (*Id.* at p. 565.)

This division adopted a similar analysis in *Littlefield v. Superior Court* (1982) 136 Cal.App.3d 477 (hg. den.). That writ proceeding arose out of the "Hillside Strangler" prosecution against Angelo Buono. The People's primary witness was Kenneth Bianchi. The People had originally jointly charged Bianchi with Buono but Bianchi agreed to plead guilty in exchange for testifying against Buono. Buono asserted that Bianchi's inculpating testimony was falsely given to escape the risk of capital punishment and thus sought to cross-examine Bianchi about his conversations with his counsel which led to the plea bargain. Buono's theory was that Bianchi's counsel had disclosed facts to Bianchi about the murders which enabled Bianchi to fabricate his testimony against Buono. We held, in part: "Assuming that the evidence would show that the public

defender had done so, in counseling Bianchi about the wisdom of the plea bargain (a fact that Buono's counsel can only surmise), we see nothing to permit a violation of the traditional attorney-client privilege." (*Id.* at p. 481.)

Littlefield was followed in *People v. Johnson* (1989) 47 Cal.3d 1194, 1228, where the California Supreme Court rejected a defendant's claim that he had been denied due process by the trial court's ruling that the attorney-client privilege precluded most of the questions posed to an accomplice who testified as part of a plea bargain.

Thus, it is patent that the attorney-client privilege is not one to be easily discarded merely because a defendant asserts that invocation of the privilege results in the denial of his right to a fair trial. In an effort to avoid the force of these authorities, Flack relies upon cases which have adopted a balancing approach to decide whether or not the attorney-client privilege should yield to the accused's right to confront and cross-examine.

In *United States ex rel. Blackwell v. Franzen* (7th Cir. 1982) 688 F.2d 496, the People's only occurrence witness was the defendant's accomplice who had entered into a plea bargain with the prosecutor. Defense cross-examination of the accomplice explored the terms of the plea bargain in an attempt to show a motive to fabricate. On redirect, the People rehabilitated the accomplice through a statement he had given to the police inculpating the defendant before the prosecutor had made any promises to him. On recross-examination, the defense sought to examine the accomplice about a statement he had made to his attorney in which he allegedly claimed that the prior consistent statement had been the fruit of police

coercion. The trial court sustained the objection that the statement to counsel was protected by the attorney-client privilege. On appeal, the state court rejected the defense claim of error. In a subsequent federal habeas corpus proceeding, the district court found that the limitation placed on the defense cross-examination of the accomplice violated the constitutional right to confront and cross-examine. The Court of Appeals reversed that portion of the district court's holding. Noting the general principle that the right to confront and cross-examine is not an absolute right " 'and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process' " (*id.* at p. 500, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 295), it formulated the pertinent inquiry as follows: "The court must ultimately decide whether the probative value of the alleged privileged communication was such that the defendant's right to effective cross-examination was substantially diminished." (*Id.* at p. 501.) Because defense counsel was otherwise given wide latitude in exploring the issue of the accomplice's credibility, the Court of Appeals concluded that the invocation of the attorney-client privilege had not prejudiced the defendant's right to cross-examine the state's principal witness.

The District of Columbia Court of Appeals applied *Blackwell's* approach in *Neku v. U.S., supra,* 620 A.2d 259. There, after observing the defendant obtain cocaine from Carter, an undercover officer purchased cocaine from the defendant. Both defendant and Carter were arrested. Before trial, Carter pled guilty to obtain sentencing benefits. Carter and the undercover officer testified against the defendant at his trial. The defendant sought to call

Carter's former attorney to testify to prior inconsistent statements Carter had made to counsel which would allegedly impeach Carter's inculpatory trial testimony. The trial court sustained the objection that the statements were protected by the attorney-client privilege.

Relying upon *Blackwell*, the appellate court upheld the trial court's ruling. It reasoned that the value of the privileged communication "must be clear and substantial" to outweigh the interests served by the privilege. (*Id.* at p. 263.) Essential to that determination are both the intrinsic probative value of the information conveyed by the privileged communication and the alternative means open to the accused to otherwise make the same point. (*Ibid.*) The *Neku* court concluded, after a careful review of the record, that the probative value of the proffered impeachment was inadequate to outweigh the interests protected by the attorney-client privilege given the other methods available to impeach Carter. (*Id.* at p. 264.)

We do not believe that either *Blackwell* or *Neku* support Flack's contention that the trial court erred in not permitting White's testimony about Godlewski's comments to counsel. Both cases are clearly distinguishable in that each involved an attempt to breach the attorney-client privilege held by an accomplice who had already pled guilty; at bench, Flack seeks to penetrate the confidential attorney-client relationship of a codefendant who is being jointly tried. There is a great potential for mischief inherent in a case such as this where codefendants are jointly tried but each attempts to shift responsibility to the other. Moreover, as the *Neku* court itself noted, there is a valid concern that if the privilege is easily breached by a defendant, "the price may be to open up to

view entire discussions between attorney and criminal defendant as the prosecutor in turn fairly seeks" to use privileged communications. (*Neku v. U.S., supra,* 620 A.2d at p. 262.)

In any event, neither case holds that the defendant has a per se right to breach the attorney-client privilege in order to present a defense. The most which can be distilled from the two cases is that a criminal defendant *may,* under certain circumstances, have the right to use privileged communications. To make that determination, a court must employ a balancing process to decide if a breach of the privilege is necessary to implement the accused's constitutional rights.[27]

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[27] Flack also relies upon several California cases to support his claim that the attorney-client privilege should yield to his right to a fair trial. The cases are distinguishable for several reasons and, in any event, add nothing to the analyses found in *Neku* and *Blackwell.*

First, none of the cases involved disclosure of a statement made by a codefendant jointly charged and prosecuted. Instead, the cases raise issues about discovery of information about a victim or a witness.

Second, most of the cases involved assertion of a privilege other than the attorney-client privilege. (*Rubio v. Superior Court* (1988) 202 Cal.App.3d 1343 [defendant sought videotape in possession of the victim's parents who asserted confidential marital communications privilege and constitutional right to privacy]; *People v. Boyette* (1988) 201 Cal.App.3d 1527 [defendant sought disclosure of medical and psychiatric records of eyewitness to determine witness's competency and credibility]; *People v. Reber* (1986) 177 Cal.App.3d 523 [defendant sought disclosure of victim's psychiatric records].)

Third, in the one case involving an assertion of the attorney-client privilege, the privilege was raised by the employer of the victims. In *Vela v. Superior Court* (1989) 208 Cal.App.3d 141, the

In both *Neku* and *Blackwell*, the trial and appellate courts found that the balance tilted in favor of sustaining the privilege. In fact, Flack has not cited any case in which a court has concluded that the balance weighed in

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defendants were charged with committing crimes upon Culver City police officers. The police officers had made statements to counsel for Culver City for defense against potential civil actions arising out of the crimes. The defense sought discovery of those statements. Culver City asserted the attorney-client privilege. The Court of Appeal concluded that because Culver City was attempting "to protect from disclosure written statements of the very police officers whose trial testimony will be necessary to prove the criminal charges filed against the defendants[,] . . . adherence to a statutory attorney-client privilege must give way to pretrial access when it would deprive a defendant of his constitutional rights of confrontation and cross-examination." (*Id.* at pp. 150-151.) Thus, because the privilege was asserted not by a *codefendant* but by the employer of the victims of the crimes, the *Vela* court had no reason to even consider the extent to which such disclosure could impact upon a codefendant's constitutional right to competent representation.

In any event, even were we to assume that, taken together, these cases stand for the proposition that the attorney-client privilege of a codefendant can be overridden in some situations, none of the cases hold that disclosure is automatic. That is, because a balancing process is the touchstone of the analysis, the appellate courts have only required the trial court to determine, after conducting an in-camera review of the privileged matter, if disclosure of the privilege matter is essential to ensure a defendant's right to a fair trial. (*Vela v. Superior Court, supra,* 208 Cal.App.3d at p. 151; *Rubio v. Superior Court, supra,* 202 Cal.App.3d at p. 1350; and *People v. Boyette, supra,* 201 Cal.App.3d at p. 1534.) This approach is consistent with the conclusions reached in *Neku* and *Blackwell.* For the reasons we will explain, the balance in the present case weighs in favor of upholding the privilege.

favor of overriding the attorney-client privilege and disclosing the information at trial. Thus, the only question in this case is whether employment of a balancing process required overriding the privilege so as to permit White's testimony. We think not.

In regard to that prong of the determination which necessitates evaluating the "intrinsic probative weight" (*Neku v. U.S., supra,* 620 A.2d at p. 263) of the proffered testimony, Flack greatly overstates his case when he claims that in the statements Godlewski "admitted guilt and exonerated his codefendants." Godlewski only stated, in response to a statement by counsel that he "would have been better off saying" that he had done it instead of blaming it on Flack and Brown, "That's what I'm going to tell them, that I did it, not these guys." This conversation merely suggests that as a matter of trial tactics, Godlewski was going to assert he had done the killing. The conversation contains no affirmative representation by Godlewski that, in fact, he actually did do the killing.

In regard to that prong of the determination which calls for evaluating "the availability of other means by which the defendant can pursue" the same point (*Neku v. U.S., supra,* 620 A.2d at p. 263), the record discloses that Flack did, in fact, present other evidence to support his claim that Godlewski had admitted having actually committed the murder. Two witnesses (Baugh and McLemore) testified that "Ray" admitted that he had killed the victim. Flack's argument that White's testimony was necessary to corroborate their testimony overlooks two significant points. One is that the trial court prevented the prosecutor from taking unfair advantage of its ruling

sustaining the privilege by ruling that he could not argue that there was no corroboration for the testimony of Baugh and McLemore. The second, and more significant, is that Flack, in the course of his trial testimony, twice recounted a conversation with Godlewski in which the latter confessed to him that he had accidentally shot his father.[28]

Given Flack's testimony that Godlewski said that he had *accidentally* shot the victim, an incredible claim in light of all of the other evidence in this case,[29] we conclude that, on balance, Flack has not demonstrated a compelling need for the use of the statements. A fortiori, the trial court did not err.[30]

The Trial Court Properly Declined Brown's Request for Jury Instructions About Accessory After the Fact

In regard to Brown, the trial court submitted instructions on first and second degree murder but denied his

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[28] Flack testified: "[H]e [Godlewski] said that he got a threatening phone call from his dad on the 3rd of July night and that he had taken the gun that I had sold him and went to his dad's house and that when his dad answered the door his dad started yelling at him and he went to grab the gun from Ray and the gun went off and hit him in the face. Then after he realized he killed his father he got scared and left the gun in the front yard and went back to his house."

[29] Flack seems to have implicitly recognized the inherent improbability of the thesis that Godlewski shot his father because he gave that theory brief mention in closing argument and really used it only to argue reasonable doubt.

[30] Following the jury's verdict, Flack renewed this claim in his motion for a new trial. The trial court denied the motion.

request for CALJIC No. 6.40 which sets forth the elements of being an accessory after the fact.[31] Brown had urged that pursuant to *People v. Geiger* (1984) 35 Cal.3d 510, he was entitled to submission of CALJIC No. 6.40 because the offense of accessory after the fact was a lesser related offense to the murder charge.

People v. Geiger, supra, 35 Cal.3d at page 531, held that, upon request, a defendant is entitled to instructions about a lesser related offense if the following criteria are met: (1) there is an evidentiary basis, other than an inexplicable rejection of prosecution evidence, on which the jury could find the offense to be less than that charged; (2) the lesser related offense is closely related to the charged offense; and (3) a conviction for the related offense would be consistent with the defendant's theory of defense.

In denying Brown's request for CALJIC No. 6.40, the court found that submission of such an instruction would have been inconsistent with his defense theory which essentially was a complete denial of *any* criminal culpability.[32] Our review of the record supports that conclusion.

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[31] Penal Code section 32 provides: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony."

[32] The court stated, in part: "This seems to me that there is nothing more that defendant Brown is resting on that a complete denial of culpability and as such would not be entitled to a lesser related crime offense. [¶] In accord is People v. Lofink, 206

As explained earlier, the People's case-in-chief consisted of circumstantial evidence connecting Brown to the murder. (See pp. 25-26, *ante*.) After the People rested, Brown unsuccessfully moved for a judgment of acquittal. (Pen. Code, § 1118.1.) He argued that there was no direct evidence that he was the driver of the getaway car or that, if he were, he knew of Flack's criminal intent.

Additionally, Brown argued that at most his guilt was that of an accessory after the fact because "if, in fact, the court finds that [he] was the getaway driver, . . . there may be enough to get by this [Pen. Code, § 1118.1] motion to show that with a loud boom, the way the car was parked, that [he] could have observed what Gene Flack did after Gene Flack does what he does, gets back in the car and [he] drives him away, that may cause [him] to answer to a violation of Penal Code section 32." This latter argument, however, was completely inconsistent with how Brown had responded to the People's witnesses. Through cross-examination and argument, Brown had emphasized that no one could identify the driver of the getaway car; that the nature of Brown's remarks about doing a job with Flack were ambiguous; and that there was nothing inherently unusual about Brown's spending spree or desire to visit Mexico. That is, in order to demonstrate his lack of involvement with the crime, Brown had attempted to place an innocent spin on each item of circumstantial evidence. He never used any of the

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Cal.App.3d 161, that is the only basis, it appears to me, that the defendant Brown is relying on is a mere unexplainable rejection of the People's evidence . . . and your request for an instruction as to Penal Code section 32 as a lesser related is denied."

items to prove or suggest, as he now does on this appeal without any citation to the voluminous record, that there was "evidence from which the jury could have concluded that [he] was unaware of Flack's actual intent and became a 'participant' only after the shooting took place. His actions after the shooting are quite consistent with that of a person who knew about the shooting, was willing to keep quiet about it for a price but who was not involved in it as a principal."

Furthermore, nothing transpired in the defenses presented by either of his two codefendants to support an argument that Brown's liability could be limited to that of an accessory after the fact.

Godlewski's testimony established Brown's participation in the crime. Godlewski testified that several weeks before the murder, he had told Flack that he wished his father were dead; that Flack offered to do the job for $5,000; and that he told Flack to " 'go ahead.' " Godlewski spoke with Flack again on July 1, 1989, after his father had threatened him and told him that his father "had to be stopped" and that he would pay $7,000. Flack responded: " 'Consider it done.' " At that point, Brown, who lived next door, arrived, stated " 'Yeah, consider it done' " and then asked Flack " 'Consider what done?' " Flack responded: " 'Don't worry about it.' "

Godlewski telephoned Flack the morning of July 4 whereupon Flack told him that he had killed his father and wanted the $7,000. On July 6, Godlewski met Flack and gave him $5,000. Several days later, he met Flack and Brown and gave Flack $2,000 who in turn then gave a

portion of the money to Brown. Brown admitted to Godlewski that he had driven Flack to the victim's house, had waited in the car while Flack shot the victim and then had driven the car away with its headlights off. Brown's cross-examination of Godlewski only sought to elicit the concession that Brown had not admitted being the shooter.

In contrast to Godlewski's version of the events, Flack did not implicate Brown as he (Flack) denied direct involvement in the shooting. He testified that Godlewski had approached him about killing his father but claimed that he had declined the offer. He admitted only that he had obtained a sawed-off shotgun for Godlewski several weeks before the killing. After the murder took place, he blackmailed Godlewski for $2,000 because he believed that Godlewski had killed his father with said shotgun. Soon thereafter, he panicked and fled to Louisiana because he felt his role in the murder would be misunderstood.

As for the night of the murder, Flack claimed he never left his home. To a certain extent, Flack also supplied an alibi defense for Brown by placing him at his (Flack's) home at the time of the murder and testifying that Brown's car was not working that day. Brown did not cross-examine Flack.

Thus, it is apparent that there was no evidence, either after the presentation of the People's case-in-chief or following the presentation of the codefendant's defenses, to suggest that Brown was merely an accessory after the fact. Brown's defense was denial of any criminal complicity. Nothing in the record even hints that Brown was

ignorant of Flack's criminal intent when he drove him to the victim's house but later learned of the murder and thereafter acted with the intent of helping the principal(s) avoid prosecution. In fact, the testimony placing Brown's car at the scene of the crime at two different points several hours before the killing demonstrates that Brown was involved with the planning of the crime.

The policy behind requiring submission of instructions on lesser related offenses is "to enable the jury to determine fairly the issues presented by the evidence and in so doing to avoid any incentive to convict the defendant of a greater offense than that which he committed." (*People v. Geiger, supra,* 35 Cal.3d at p. 531.) In this case, if the jury chose not to interpret the circumstantial evidence against Brown in the manner suggested by the People, it had the clear option of returning a verdict of not guilty. As an instruction on a lesser related offense "need not be given if the defense theory and evidence reflect a complete denial of culpability . . . or the only issue is identity" (*id.* at pp. 531-532), the trial court properly denied Brown's request for use of CALJIC No. 6.40.

Brown's Sentence Is Not Constitutionally Disproportionate

Flack, convicted of first degree murder with the special finding that the murder had been committed for financial gain (Pen. Code, § 190.2, subd. (a)(1)), was sentenced to a life term without possibility of parole. Additionally, Flack received a two-year determinate sentence for the finding that he personally used a firearm in the commission of the offense. (Pen. Code, § 12022.5.) Brown,

convicted of first degree murder, was sentenced to a term of 25 years to life, with a one-year enhancement for the finding that he was armed with a firearm. (Pen. Code, § 12022, subd. (a).) Godlewski, convicted of second degree murder, received a sentence of 21 years to life based upon the following: (1) 15 years to life for the murder conviction; (2) 1 year for the armed with a firearm finding (Pen. Code, § 12022, subd. (a)); and (3) 5 years for a prior conviction (Pen. Code § 667, subd. (a)) which the court found to be true.

At the sentencing hearing, Brown argued that his conviction should be reduced to second degree murder. He cited his lack of a prior criminal record and the fact that Godlewski had been convicted only of second degree murder. In denying the motion, the court stated "in looking at the culpability of defendant Brown and in reviewing the facts, I find, again, that he was an active participant in this case. I do not find that the proscription as against first-degree murder to be cruel and unusual punishment. I do not find first degree murder or his punishment to be grossly disproportionate to the offense as defined or as committed by defendant Brown or to his individual culpability."

Relying upon *People v. Dillon* (1983) 34 Cal.3d 441, Brown now asks this court to reduce his conviction to second degree murder. Our examination of that case compels rejection of the request.

In *Dillon*, the 17-year-old defendant organized his companions to steal from the victim's growing marijuana crop. The defendant shot the victim with a semi-automatic rifle when the victim, carrying a shotgun, came

upon the defendant and his companions. The defendant, convicted of first degree murder based on an application of the felony-murder rule, was sentenced to a term of 25 years to life.

The Supreme Court found the sentence to be excessive under the facts and reduced the conviction to second degree murder. The court found that a punishment can be excessive "if it is grossly disproportionate to the offense for which it is imposed." (*Id.* at p. 478.) In that regard, a reviewing court must examine the nature of the offense, with particular regard to the danger the crime posed to society. The examination should include analysis of the defendant's motive, the manner in which the crime was committed, the extent of the defendant's involvement, and the consequences of his acts. Additionally, the court must focus on the individual defendant to determine if the punishment is grossly disproportionate to the defendant's individual culpability because of his age, prior criminality, personal characteristics, and state of mind. (*Id.* at p. 479.)

In *Dillon*, the court reduced the defendant's sentence for several reasons. The most significant was that his culpability was based on application of the felony-murder rule in lieu of a finding of express intent to kill. To the Supreme Court, defendant's shooting of the victim "was a response to a suddenly developing situation that defendant perceived as putting his life in immediate danger." (*Id.* at p. 488.) Furthermore, the defendant was only 17 years old and had no prior record. Lastly, none of defendant's companions was convicted of any homicide offense or sentenced to prison for any crime.

Subsequent decisions have noted that *Dillon's* use of a proportionality analysis to reduce a first degree murder conviction is the exception rather than the general rule. (See, e.g., *People v. Smith* (1986) 187 Cal.App.3d 666, 682-683 and *People v. Munoz* (1984) 157 Cal.App.3d 999, 1014.) As Brown concedes, no appellate court has utilized *Dillon* to reduce a first degree murder conviction.

We do not find that Brown's sentence is constitutionally disproportionate. Unlike the accused in *Dillon*, Brown's guilt is based neither upon an accidental killing nor a sudden response to a provocative situation. Brown's guilt is based upon the fact that with knowledge and intent and for monetary compensation, he assisted Flack in carrying out Godlewski's desire to kill his father. Several hours before the killing, Brown twice drove by the victim's home. Brown returned a third time and waited while Flack committed the crime. The victim was killed in an execution-style slaying; when he answered his door, unarmed, in the middle of the night, Flack murdered him with a shotgun blast. Brown then turned off the headlights on his car and drove Flack from the scene at 70 miles per hour. A few days later, Brown met with Godlewski, acknowledged his role in the murder, accepted payment for his actions, and then went on a spending spree. Given these circumstances, the fact that Brown was not the actual killer is not dispositive as his participation was essential to this murder-for-hire scheme. (See *People v. Smith, supra*, 187 Cal.App.3d at p. 683 and cases cited therein.)

Nor does Brown's lack of a prior criminal record or relative youth (almost 21 years old at the time of the murder) outweigh the extremely serious nature of the

offense. "The intentional killing of another human being is the ultimate expression of violence, particularly, as in this case, where the victim was unarmed." (*People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1524.)

Lastly, this case in no manner approaches *Dillon* where the "defendant received the heaviest penalty provided by law while those jointly responsible with him received the lightest – the proverbial slap on the wrist." (*People v. Dillon, supra,* 34 Cal.3d at p. 488.) Flack received the highest penalty, a life sentence without possibility of parole. Brown was sentenced to 25 years to life for the first degree murder conviction. Godlewski was sentenced to 15 years to life for the second degree murder conviction. The 10-year difference between the latter two sentences results because the jury credited Godlewski's claim of provocation, a theory recognized by law, and consequently convicted him of second degree murder instead of first degree murder. As the Legislature has set forth different levels of punishment depending on the degree of murder (Pen. Code, § 190, subd. (a)), different sentences were required. However ill-advised we may feel the jury's decision was vis-a-vis Godlewski, the sentencing effect of that conclusion does not render Brown's sentence constitutionally disproportionate given the nature of the crime and Brown's role in it.

Flack Is Entitled to Conduct Credits

The jury found Flack guilty of first degree murder and found true the allegation that he had used a firearm during commission of the crime. (Pen. Code, § 12022.5.) The trial court sentenced Flack to an indeterminate life

term for the murder and to a determinate two-year term for the firearm use. The trial court granted him credit for 465 days already served but denied him any conduct credits.

Relying upon *In re Monigold* (1983) 139 Cal.App.3d 485, Flack now urges that he should be given conduct credits of 232 days to be applied against the determinate two-year portion of his term. The People concede this point. We will therefore order the judgment to be so modified.

The Trial Court's Evidentiary Rulings Did Not Preclude Godlewski From Presenting His Defense

At trial, Godlewski never denied involvement in his father's death.[33] Instead, he sought to minimize his culpability for the charged offense of first degree murder with the special circumstances allegation of murder for financial gain. He urged he could be guilty only of second degree murder because the facts demonstrated a lack of premeditation and deliberation. Alternatively, he argued he had committed only voluntary manslaughter based upon one of two theories. The first was the so-called "imperfect self-defense" doctrine which reduces an intentional killing from murder to voluntary manslaughter if the killing is committed under an honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury. (*People v. Flannel* (1979)

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[33] The People presented very strong evidence of Godlewski's guilt. For instance, his uncle testified that he spoke with Godlewski by phone after he had been arrested and that Godlewski admitted having had Flack and Brown kill his father.

25 Cal.3d 668, 674-680.) The second was the theory of a killing triggered by provocation extending over a considerable time period. (*People v. Wharton* (1991) 53 Cal.3d 522, 569-571.)

Regardless of whether Godlewski was attempting to show the absence of the elements of first degree murder or the commission of a voluntary manslaughter, he relied upon the same set of facts: (1) the victim's infliction upon him of a lifetime of physical and emotional abuse; (2) the victim's violent acts perpetrated upon third persons; and (3) the victim's recent threats against Godlewski and his stepmother Gloria Uhlman because Uhlman was threatening to take the victim to court to enforce a child support order. Godlewski himself testified at great length about these matters as did several family members. Their testimony embraced events occurring within the prior *20* years. Additionally, Godlewski proferred the testimony of Dr. Kaser-Boyd, an expert in the field of child abuse and family violence.

Notwithstanding all of the evidence offered to support his claim of mitigating circumstances, Godlewski now complains the trial court impermissibly restricted his right to produce evidence about the violent nature of the victim. He points to the trial court's rulings that to the extent witnesses other than Godlewski would testify to violent acts of the victim directed at third parties, such testimony would be limited to acts which Godlewski had witnessed; that no testimony would be permitted about violent acts the victim had committed against property as opposed to person; and that witnesses other [sic] Godlewski could not testify to threats of future harm the victim had made against Godlewski's stepmother.

Having examined the record in detail, we find no error. The trial court possesses a wide discretion in admitting evidence about specific instances of the victim's violent conduct. (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446-449.) The trial court's rulings were proper. As Godlewski's state of mind was the dispositive issue, it was proper to limit evidence to violent acts he had observed. In a similar vein, because Godlewski was urging he was in fear for himself or others, violent acts the victim had directed against property lacked probative value. Lastly, the proferred testimony from witnesses other than Godlewski about the victim's threats to harm Uhlman was cumulative to the testimony given by Godlewski. The trial court gave Godlewski reasonable latitude in presenting his defense. Godlewski has failed to demonstrate that the court's few rulings limiting evidence of that defense were an abuse of discretion.

The Trial Court Did Not Impermissibly Limit The Testimony of Godlewski's Expert Witness

Godlewski presented as an expert witness, Dr. Kaser-Boyd, a psychologist. She had testified that he matched the profile of a battered child; that his defense mechanisms were that of an abused child; and that given all of these circumstances, he could have believed the victim would carry out his threats to harm him. In particular, her testimony focused on the effect of a threat the victim allegedly made on July 1. According to Godlewski, on that day, the victim threatened him with an AK47 if he did not give him Uhlman's address.

Godlewski now complains that he was "prevented from presenting his diminished actuality defense." Not so. Penal Code section 29 precludes an expert witness from testifying whether or not the accused had the specific mental state; only the jury can make that determination. (*People v. Gonzalez* (1990) 51 Cal.3d 1179; 1246-1247; *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1352.)

Notwithstanding this limitation, the trial court permitted Dr. Kaser-Boyd to give far-reaching testimony. The only specific error Godlewski points to arose after she gave her opinion as to how Godlewski perceived his father's potential dangerousness after he refused to give her Uhlman's address. Defense counsel asked: "Now you've indicated that his perception of dangerousness also was at its height at the time of the pointing the AK47 at him; is that correct?" Dr. Boyd answered: "Yes." Defense counsel then inquired: "And what is your clinical understanding of Ray's response to that perception?" The judge sustained the prosecutor's objection and ruled: "You can elicit from the witness the symptomology, which you have already done, of a battered person and how that would affect the battered person's perceptions of reality. We have already done that. [¶] As far as was [*sic*] what defendant Godlewski's state of mind actually was, I'm precluding that." Immediately thereafter, the court allowed Dr. Kaser-Boyd to testify how an individual who had been abused would respond if threatened with an AK47. The trial court's ruling was consistent with law. (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1197-1198 [review den.].)

Furthermore, Godlewski's claim that this ruling denied him "the opportunity to present his complete

diminished actuality defense" is belied by the record. Before the sustaining of the *one* objection, Dr. Kaser-Boyd had testified at length as to her opinion of Godlewski's perceptions of the victim's dangerousness. That is, she had given her opinions as to how a battered child would respond to the AK47 incident and that Godlewski was a battered child. In sum, Godlewski was permitted to fairly present his defense.

No Prosecutorial Misconduct Occurred

Godlewski alleges several examples of prosecutorial misconduct in regard to the prosecutor's cross-examination of Dr. Kaser-Boyd.

The prosecutor's first question on cross-examination was what the witness perceived "as [her] role in testifying." She responded: "To understand and explain an individual's mental state at the time of an offense." The prosecutor then moved to strike all of her direct testimony because Penal Code section 29 prohibits an expert from testifying whether or not the accused has the required mental state. The court denied the prosecutor's request but did inform the jury: "[D]espite the perception of Kaser-Boyd, the law precludes any expert from testifying that a defendant did have or did not have any required mental state." Immediately thereafter, the prosecutor asked Dr. Kaser-Boyd: "You now heard the judge say that your perception of what you are here for is illegal?" The court sustained Godlewski's objection to the question. The prosecutor then asked: "You don't want to break the law, do you?" Godlewski did not object and the witness answered: "I don't break the law." Later in the

cross-examination, Dr. Kaser-Boyd testified that her role was to "help[] the jury understand what kind of mental state the defendant [Godlewski] may have been in at the time of this offense." The prosecutor responded: "You already heard the judge tell the jury that you cannot do that?" Godlewski objected: "This . . . is argumentative." The court responded: "It is argumentative. True but argumentative." The prosecutor then pursued another area.

This is a tempest in a teapot. No prosecutorial misconduct occurred. There was nothing improper in clarifying for the jurors that they, not Dr. Kaser-Boyd, were to determine Godlewski's mental state. Although the prosecutor's next question was improper, the court sustained Godlewski's objection to it. The jury is presumed to have followed the instruction to disregard insinuations suggested by a question and statements of counsel. As to the last question, Godlewski's failure to object on the basis of prosecutorial misconduct constitutes a waiver of his right to pursue this claim on appeal. (See, e.g., *People v. Walker* (1988) 47 Cal.3d 605, 626.) In any event, the question merely reiterated, albeit in an argumentative manner, a point which had already been properly made.

The Prosecutor's Cross-Examination of Two of Godlewski's Witnesses Was Proper

Godlewski urges that the trial court erred in permitting the prosecutor, over his objections, to ask two defense witnesses questions which went beyond the scope of direct examination.

The first witness was George King, the manager at the trucking company where both Godlewski and the

victim had worked. On direct examination, he had testified to Godlewski's work schedule on July 3, 1989, the day before the murder. On cross-examination, the prosecutor asked if, after the murder, Godlewski had attempted to claim the victim's remaining paychecks. The prosecutor averred this evidence was relevant because of the allegation to murder for financial gain. The court allowed the prosecutor to pose a limited number of questions on the point because of its "inherent ability [to] control . . . the proceedings." When the prosecutor was done, Godlewski declined the court's offer to ask further questions on that subject.

The second witness, Estela Llamas, the owner of the Dixie Cafe, testified that on July 3, 1989, Godlewski and the victim had lunch in her restaurant; that both appeared in "good humor"; and that nothing appeared out of the ordinary. On cross-examination, after Llamas had testified that she had known the two men for over two years, the prosecutor asked about a May 1989 conversation in which the victim told Godlewski that he was going to change his will to leave all of his estate to him. Once again, Godlewski objected that this was beyond the scope of direct examination. The trial court overruled the objection stating "this is murder for financial gain." As with King, Godlewski chose not to pose any questions on this issue.

Godlewski now urges that the court improperly allowed the prosecutor to use its cross-examination of King and Llamas to adduce improper rebuttal evidence. This is much ado about nothing. The trial court possesses great discretion in this regard. And more importantly, no harm, no foul. The evidence about which Godlewski now

complains went to the issue of murder for financial gain. The jury's finding of second degree murder instead of first degree murder obviated any need to consider that issue. Thus, Godlewski, who failed to cross-examine either of the witnesses about the "new information" or to request a continuance to prepare to answer this testimony, cannot demonstrate any prejudice inuring to him as a result of their testimony.

No Prejudicial Instructional Error Occurred

Godlewski raises two claims of instructional error. The court instructed the jury about voluntary manslaughter but denied defendant's request to modify the instruction to include language that acts committed over a long time period may create legally adequate provocation. Defendant's request to modify the instruction should have been granted because he had presented evidence on that theory. (*People v. Wharton, supra,* 53 Cal.3d 522, 569-571.) However, that error does not require reversal. The jury was otherwise given comprehensive instructions on provocation[34] and nothing in those instructions precluded the jury from finding adequate provocation resulting from the victim's conduct which occurred over a long time period (*id.* at p. 572), a point which was presented in defendant's closing argument.[35]

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[34] Eight instructions embracing different aspects of the law of voluntary manslaughter were submitted to the jury. (CALJIC Nos. 5.17, 8.40, 8.42, 8.43, 8.44, 8.50, 8.72, and 8.73.)

[35] For instance, in closing argument, counsel urged: "We've heard the testimony about his [Godlewski's] state of mind during [his conversation on July 1 with Flack], that he was angry

Godlewski's second claim of error is that the court erred in declining his request that the jury be instructed about the crime of solicitation to commit murder. (Pen. Code, § 653f, subd. (b).) Relying upon *People v. Geiger, supra*, 35 Cal.3d 510, he claimed entitlement to such an instruction because it was a lesser related offense shown by the evidence. The trial court denied the request, finding it to be inconsistent with defendant's defense theory. The ruling was proper. Godlewski conceded he had asked Flack to murder his father and he claimed that Flack had done so. Nothing in either Godlewski's defense or his cross-examination of the People's witnesses and codefendant Flack's witnesses remotely suggested that he was liable only for the crime of solicitation to commit murder. From the beginning to the end of the trial, the issue posited by Godlewski was whether there were mitigating circumstances which could reduce his criminal culpability. Godlewski's new-found fanciful theories[36] are simply not supported by the record.

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and in a rage. We have heard that at that time he felt the – that he was in immediate fear of his father. He was in a heat of passion because of all that had taken place before and all that had led up to that. [¶] I'm not going to go through it. You've heard it all. It's all in the record and I'm sure you're aware of all of the details." At the end of argument, counsel reiterated: "We're not asking for an acquittal. We're not asking for any license to do anything. We are simply saying look at what it was that he did. Look at the emotion behind it. Look at the passion. Look at the clouded judgment. Look at the beliefs that he had and the way in which he acted."

[36] For instance, in his reply brief, he urges: "Appellant wanted to argue alternatively. First, he did not attack his father. Alternatively, that if the jury found part of Flack's story believable, that Flack was the subject of a solicitation but did not

Godlewski Has Failed to Establish Juror Misconduct

Godlewski argues prejudicial error occurred because the court failed to discharge a juror who slept during a portion of the trial proceedings.

The issue first arose during Godlewski's testimony on September 7. His counsel approached the bench and stated that he had noticed that the juror "was dozing." The judge replied he had been watching the jurors; that he had not noticed any of them dozing; and that he would watch for any sleeping.

Defense counsel renewed his concern on September 12 during the testimony or Dr. Kaser-Boyd. The judge responded that he had been watching the juror in question throughout the trial and that he did not appear to be sleeping.

However, very shortly after Dr. Kaser-Boyd resumed her testimony, the court excused the jury panel and informed defense counsel that it appeared that the juror, Dean Later, had fallen asleep. The court then had Later brought into the courtroom and asked him twice if he had been falling asleep. The juror replied in the negative each time. Godlewski did not ask to pose any questions to Later. The court stated that it would accept Later's representation that he had not been sleeping but that he would continue to watch him and would take action if he did

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commit the act, and that appellant himself went to the house, engaged in a fight with his father, then at most, he was guilty of manslaughter *and* solicitation. The request for the lesser related solicitation was not mutually exclusive proposition with manslaughter but in conjunction with it on the facts as presented by Flack." (Emphasis in original; fn. omitted.)

sleep. Godlewski did not object to any aspect of the court's ruling.

The issue was never again raised during the trial.

Godlewski's claim of prejudicial juror misconduct is patently devoid of merit as it is based on the assumption that Later had, in fact, been sleeping. After examining Later, the court concluded to the contrary. As substantial evidence supports said determination (*People v. Van Houten* (1980) 113 Cal.App.3d 280, 288; *People v. Manriquez* (1976) 59 Cal.App.3d 426, 432), we uphold the court's decision that good cause did not exist to discharge Later from the jury.

Disposition

The judgment entered against Gene E. Flack is modified to reflect that he shall receive 232 days of conduct credits to be applied against the determinate two-year portion of his sentence; the trial court shall prepare and forward an amended abstract of judgment to the Department of Corrections reflecting this modification. In all other respects, the judgments are affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

VOGEL (C.S.), J.

We concur:

WOODS (Arleigh), P.J.

EPSTEIN, J.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, VS GENE FLACK, Defendant.	NO. LA001944 PROPOSED QUESTIONS TO BE ASKED OF JURORS IN VOIR DIRE. (Filed July 16, 1990)

1. Has any juror been a victim of a crime, or does he have any relatives or friends who were victims of a crime?

2. What is the educational level of each juror?

3. Does any juror own guns, or belong to any gun association such as the National Rifle Association?

4. What does each juror like to do for recreation?

5. What clubs or organizations does each juror belong to?

6. Are any jurors very active in their religious affiliation?

7. Does any juror have any friends or relatives who are law enforcement officers?

8. Has any juror or friend or relative of any juror ever been accused of a crime?

PRESENT PHILOSOPHY OF JUROR

9. Does any juror feel that the courts are too liberal in their treatment of defendants?

10. Does any juror feel that the defendant should have to prove his innocence?

11. Does any juror have any negative feelings about lawyers in general?

12. Does any juror have a preference for District Attorneys over Defense counsel or vice-versa?

PRESUMPTION OF INNOCENCE

Counsel requests that the court read instruction 2.90 to the jury here.

13. Does any juror have any difficulty in believing in the presumption of innocence?

14. Does any juror feel that the defendant must be guilty or else he wouldn't be here?

15. Does any juror feel that just because the D.A. files a case against someone, he must have enough evidence to prove it?

16. Does any juror doubt that sometimes innocent people have charges filed against them by the D.A.?

17. Does any juror feel that a not guilty verdict is always the result of a legal loophole or a technicality only?

18. Is it difficulty [sic] for any juror to presume that the defendant is innocent?

PREJUDICIAL EVIDENCE

19. Does the nature of this case upset any juror to the point where they would not be able to view and consider the evidence objectively?

20. Would all the jurors require that the evidence prove something rather than merely upset them and cause them to speculate on the truth of the charges?

CREDIBILITY OF WITNESSES

21. Do all jurors feel that witnesses can and sometimes do lie?

22. Will all jurors critically analyze the testimony of witnesses rather than merely accepting everything at face value?

23. Will all jurors examine a witness' possible motives to lie?

24. Will any juror automatically discredit a defendant's testimony or that of his witnesses?

25. Does any juror feel that defense witnesses are more likely to lie than prosecution witnesses?

26. If a defendant chose not to testify, is there any juror who would automatically find him guilty?

    Here, I would request the court to give the instruction on a defendant not testifying.

27. Is there any juror who might convict a defendant even though he or she entertained a reasonable doubt of his guilt, because they were repulsed by the nature of the accusation?

GENERAL OPINIONS OF JURORS

29. Is there any juror who feels that he or she cannot be a fair, impartial and unbiased juror in this case?

30. Is there any juror who is uncomfortable with the nature of this case and would rather not sit as a juror on this case?

31. Is there anything that any juror feels that we ought to know about in evaluating him or her as a potential juror on this case?

Second Appellate District, Division Four, No. B055480
S034886

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed Oct. 21, 1993)

THE PEOPLE, Respondent

v.

RAYMOND E. GODLEWSKI Et Al., Appellants

Petitions for review DENIED.

LUCAS
Chief Justice